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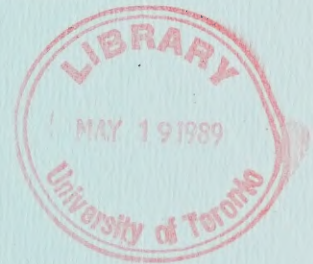
# ENVIRONMENTAL ASSESSMENT BOARD

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VOLUME: 100

DATE: Monday, May 8th, 1989

BEFORE: M.I. JEFFERY, Q.C., Chairman  
E. MARTEL, Member  
A. KOVEN, Member



FOR HEARING UPDATES CALL (TOLL-FREE): 1-800-387-8810

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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL  
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR  
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental  
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental  
Assessment for Timber Management on Crown  
Lands in Ontario;

- and -

IN THE MATTER of an Order-in-Council  
(O.C. 2449/87) authorizing the  
Environmental Assessment Board to  
administer a funding program, in  
connection with the environmental  
assessment hearing with respect to the  
Timber Management Class  
Environmental Assessment, and to  
distribute funds to qualified  
participants.

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Hearing held at the Ramada Prince Arthur  
Hotel, 17 North Cumberland St., Thunder  
Bay, Ontario, on Monday, May 8th,  
1989, commencing at 9:00 a.m.

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VOLUME 100

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member





A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	MINISTRY OF NATURAL
MS. C. BLASTORAH )	RESOURCES
MS. K. MURPHY )	
MS. Y. HERSCHER )	
MR. B. CAMPBELL )	MINISTRY OF ENVIRONMENT
MS. J. SEABORN )	
MR. R. TUER, Q.C.)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN )	ASSOCIATION and ONTARIO
MS. E. CRONK )	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY )	ASSOCIATION
MR. J. WILLIAMS, Q.C.	ONTARIO FEDERATION OF
MR. B.R. ARMSTRONG	ANGLERS & HUNTERS
MR. G.L. FIRMAN	
MR. D. HUNTER	NISHNAWBE-ASKI NATION and WINDIGO TRIBAL COUNCIL
MR. J.F. CASTRILLI)	
MS. M. SWENARCHUK )	FORESTS FOR TOMORROW
MR. R. LINDGREN )	
MR. P. SANFORD )	KIMBERLY-CLARK OF CANADA
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MR. R. EDWARDS )	NORTHERN ONTARIO TOURIST
MR. B. McKERCHER)	OUTFITTERS ASSOCIATION
MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD )	





APPEARANCES: (Cont'd)

MR. J.W. ERICKSON, Q.C.) MR. B. BABCOCK )	RED LAKE-EAR FALLS JOINT MUNICIPAL COMMITTEE
MR. D. SCOTT ) MR. J.S. TAYLOR)	NORTHWESTERN ONTARIO ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL) MR. S.M. MAKUCH )	GREAT LAKES FOREST
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MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
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MR. R. REILLY	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY
MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON





(iii)

APPEARANCES: (Cont'd)

MR. C. BRUNETTA

NORTHWESTERN ONTARIO  
TOURISM ASSOCIATION





I N D E X      O F      P R O C E E D I N G S

Re: Application by Forests for Tomorrow                      Page No.

Submissions:

Mr. Castrilli (FTM).....	16626
Ms. Palowski (NAN).....	16694
Mr. Campbell (MOE).....	16695
Ms. Cronk (OFIA/OLMA).....	16750
Ms. Murphy (MNR).....	16799



1 ---Upon commencing at 9:07 a.m.

2 THE CHAIRMAN: Good morning. Be seated,  
3 please.

4 MR. CASTRILLI: Good morning, Mr.  
5 Chairman.

6 THE CHAIRMAN: Good morning, Mr.  
7 Castrilli. Welcome back to the ongoing saga.

8 MR. CASTRILLI: Thank you. I notice that  
9 it's almost the one-year anniversary of the  
10 commencement of the proceedings. I am very pleased to  
11 be here on that occasion, as well as this is the 100th  
12 day of the hearings.

13 THE CHAIRMAN: Well, I am sure they are  
14 both records we can all be proud of. I am not sure how  
15 many times we want to repeat it in the future, but...

16 MR. CASTRILLI: Somehow I feel certain  
17 there may be at least one more anniversary.

18 THE CHAIRMAN: Before we commence with  
19 your motion, is there anybody in the room who has  
20 particularly turned out today for the exercise on  
21 scoping Panels 12 and 13 specifically?

22 (no response)

23 Okay. We will proceed in the order of  
24 hearing Mr. Castrilli's motion first and, subsequent to  
25 that we will deal with the scoping of those two panels



1 and, lastly, we will deal with the question of the  
2 Board taking the opportunity in September or October to  
3 go to the community hearings.

4 MR. CASTRILLI: Thank you.

5 Mr. Chairman, you should have before you  
6 quite a lot of paper. I want to sort out for you which  
7 part of that paper is our paper. It should be a  
8 Statement of Fact and Law dated April 12th, unbound.

9 THE CHAIRMAN: I hate to start off with  
10 the first document, but I don't think I have got that  
11 first document. Wait a minute.

12 MR. CASTRILLI: That's the book of  
13 authorities.

14 THE CHAIRMAN: Right. Ours says March  
15 31st. Is that the same one?

16 MR. CASTRILLI: No. Oh, I'm sorry, you  
17 are quite right, it does say March 31. No, I'm sorry,  
18 it does say April 12th on the last page.

19 THE CHAIRMAN: Okay.

20 MR. CASTRILLI: The Notice of Motion is  
21 dated March 31.

22 THE CHAIRMAN: Right.

23 MR. CASTRILLI: And you should also have  
24 a Book of Authorities approximately an inch thick.

25 THE CHAIRMAN: We have several of those;

1       yours is one.

2                   MR. CASTRILLI:  Yes, I notice.  Now, Mr.  
3       Chairman, I've written a fairly long Statement of Fact  
4       and Law and I don't think it would serve the purposes  
5       of the Board for me to restate everything that is in  
6       the Statement of Fact and Law.  This day is going to be  
7       long enough as it is.

8                   I just want to be very briefly touch upon  
9       one or more points that are raised in the Statement of  
10      Fact And law and I, in fact, want to spend the bulk of  
11      this morning talking about and responding to the  
12      arguments that have been raised by my friends.  I think  
13      all things considered, it would be a much more  
14      productive way to proceed than for me to restate what I  
15      will take you have already read in our factum.

16                  THE CHAIRMAN:  Very well.  Before we  
17      commence, Mr. Castrilli, perhaps we should just spend a  
18      moment and settle the order of presentation on this  
19      motion.

20                  As we understand it, and I don't know  
21      whether the parties have discussed this, but you would  
22      be proceeding first followed by Mr. Hunter who I  
23      understand, Ms. Palowski, has a difficulty.

24                  MS. PALOWSKI:  He will not be attending  
25      today.

1 THE CHAIRMAN: Will not be attending at  
2 all today?

3 MS. PALOWSKI: No. We will just be  
4 making a statement.

5 THE CHAIRMAN: Sorry?

6 MS. PALOWSKI: We will just be making a  
7 statement.

8 THE CHAIRMAN: Very well. And then who  
9 is suggested to come following that, the Ministry?

10 MR. CAMPBELL: I think, Mr. Chairman,  
11 counsel have discussed the matter and it's agreed that  
12 I would follow Mr. Hunter or whatever statement is made  
13 on behalf of his client, following which the industry  
14 would be heard, and concluding with counsel for  
15 Ministry of Natural Resources.

16 THE CHAIRMAN: Very well. And is there  
17 anyone else in the room, other than the parties so  
18 named, who wish to address this motion?

19 (no response)

20 Okay. We will proceed in that order  
21 then.

22 MR. CASTRILLI: Thank you, Mr. Chairman.  
23 Very briefly to take you through the Statement of Fact  
24 and Law, you have the motion dated March 31, the relief  
25 of which is set again in the Statement of Fact and Law



1 in two different places.

2 The argument which commences at page 10  
3 just begins with a brief constitutional framework  
4 discussion and the purpose of that discussion, Mr.  
5 Chairman, quite frankly was simply to indicate that  
6 pesticides and human health are areas of concurrent  
7 jurisdiction.

8 I then outline at the beginning of page  
9 12 of the factum a brief summary of the Federal Pest  
10 Control Products Act outlining what it does and, more  
11 importantly, what it does not do. And among the things  
12 it does not do or does not require, it does not require  
13 the production of an environmental assessment, it does  
14 not authorize or permit hearings with respect to  
15 registration or re-evaluation of pesticides except in  
16 one very limited circumstance, and does not require an  
17 evaluation and review of alternatives.

18 Commencing at page 13 of the factum is a  
19 review of the federal environmental assessment review  
20 process and, Mr. Chairman, very briefly the reason that  
21 that is included is simply to indicate that  
22 notwithstanding the existence of a federal  
23 environmental assessment process at the federal level,  
24 there is no requirement and there has not been a review  
25 of pesticides under that framework.

1                   Page 14 begins a discussion of the  
2                   Pesticides Act and essentially the same comments that  
3                   apply or that were made with respect to the federal  
4                   process apply to the provincial process as well. It's  
5                   not an environmental assessment statute, no hearings  
6                   occur and there is no obligation to deal with  
7                   alternatives.

8                   At the bottom of pages 16 and 17 of the  
9                   factum I include a little bit of - if I can call it  
10                  this - pesticide history in this province in which it's  
11                  clear that notwithstanding the existence of federal  
12                  regulation, it is always open to a provincial body to  
13                  impose more stringent requirements than exist at the  
14                  federal level. And in the case of the example we set  
15                  out at the bottom of pages 16 and 17, those more  
16                  stringent requirements can include a complete -- in  
17                  effect, a complete ban notwithstanding continued  
18                  registration at the federal level.

19                  Commencing at the bottom of page 17 we  
20                  set out for you the complete text of Section 5(3) of  
21                  the Environmental Assessment Act and at paragraph 57 on  
22                  page 18 a definition of the environment. The purpose  
23                  of that discussion is simply to outline what the  
24                  obligations are of a proponent under Section 5(3) and  
25                  to outline that, in fact, the definition of environment

1 is broad enough to cover the issue of human health and,  
2 in light of Section 5(3), human health effects.

3 Mr. Chairman, the remainder of the  
4 discussion on the Environmental Assessment Act which  
5 concludes at the top of page 23 simply is for the  
6 purpose of outlining what the further requirements of  
7 proponents are and obligations imposed upon the Board  
8 by its, in effect, stepping into the shoes of the  
9 Minister after a matter is referred to it for hearing.

10 Now, I will be coming back to a number of  
11 these points when I get into my response to my friends'  
12 submissions.

13 Commencing at page 23 we outline very  
14 briefly American legislation and jurisprudence in this  
15 area. And the purpose of doing that, Mr. Chairman,  
16 first of all as you'll note referring there - and all  
17 the case law there is in relation to the National  
18 Environmental Policy Act - that statute really can be  
19 said to be the progenator of what eventually became the  
20 Environmental Assessment Act in Ontario. There are  
21 some material differences in how it is in fact  
22 structured, but the basic tenant, the basic philosophy,  
23 the basic principles that one finds in the  
24 Environmental Assessment Act can in fact be found in  
25 the U.S. National Environmental Policy Act and it's for



1       that reason, Mr. Chairman, that we went on to discuss  
2       the case law we describe at the following pages which  
3       interprets the obligations of, in that case of that  
4       statute, federal agencies who are obligated to comply  
5       with NEPA, notwithstanding any other federal  
6       requirements that might exist

7                   And, in particular, the Calvert Cliffs  
8       decision and the Bergland decision outline the  
9       propositions that we set out in the Statement of Fact  
10      and Law particularly beginning at paragraphs 73 and  
11      running to paragraph 79.

12                   And I will be coming back to those in the  
13      context of my response to my friends, but I think the  
14      essence of the discussion and what I would like you to  
15      take from the discussion of those cases there, is  
16      really that notwithstanding the existence of federal  
17      requirements in the case of Berglin, for example, the  
18      fact that the pesticides at issue had been registered  
19      under their federal pesticide law, there is a clear and  
20      continuing obligation upon a federal agency to produce  
21      information regarding human health effects of the  
22      pesticides they propose to use in their national  
23      forests.

24                   And in our submission, Mr. Chairman, that  
25      parallel is precisely the parallel that applies in the

1 case before you. As I indicated before I will be  
2 coming back to that.

3 Finally, at the bottom of page 27  
4 beginning with paragraph 81 and continuing to paragraph  
5 86 on page 30, I describe the British Columbia  
6 jurisprudence and the purpose of describing it is  
7 really substantially to distinguish it. I thought it  
8 was important to bring it to your attention, the fact  
9 that it does exist, but the burden of my comments are  
10 that you should not take account of it in the final  
11 instance. And the reason for that, Mr. Chairman, is  
12 that notwithstanding it talks about the existence of  
13 other federal and provincial laws - federal laws in  
14 that case - the statute that was being interpreted both  
15 in the Canadian Earthcare case and the Islands  
16 Protection Society case was not an environmental  
17 assessment statute; it did not require -- the statute  
18 itself did not require dealing with alternatives and  
19 did not have the other obligations with respect to  
20 reporting upon effects in the first instance that are  
21 clearly outlined in Section 5(3) of the Environmental  
22 Assessment Act.

23 It's for those reasons that I suggest in  
24 those paragraphs that the B.C. case law is completely  
25 inapplicable in these circumstances and that the

1 American case law is both persuasive and far more  
2 applicable to the situation before us.

3 That is essentially a brief overview of  
4 the factum itself.

5 Now, for the next one to two hours I will  
6 be dealing with the responses of my friends in their  
7 various factums and I would like to deal with them  
8 under the following headings. And you can take it that  
9 I will be dealing with all three factums at the same  
10 time; the Ministry of Environment, Ministry of Natural  
11 Resources and OFIA, but the headings I will be dealing  
12 with them in are the following:

13 Firstly, human health effects are  
14 Environmental Assessment Act concerns; secondly, the  
15 nature of the statutory obligations under the  
16 Environmental Assessment Act imposed upon the Ministry  
17 of Natural Resources --

18 THE CHAIRMAN: Sorry, what was that  
19 second one again?

20 MR. CASTRILLI: The nature of the  
21 statutory obligations--

22 THE CHAIRMAN: Thank you.

23 MR. CASTRILLI: --under the Environmental  
24 Assessment Act imposed upon the Ministry of Natural  
25 Resources; third, compellability of witnesses and the



1 requirement to produce evidence; and, fourth, the  
2 relevancy of prior federal and provincial approvals.

3 Mr. Chairman, let me begin with the first  
4 issue I outlined. I have already mentioned this and  
5 I'll just repeat it as a jumping off point.

6 In light of the obligation outlined in  
7 Section 5(3) of the Environmental Assessment Act, there  
8 can be no doubt that human health effects are  
9 encompassed by the definition of environment. Now,  
10 what however has been the Ministry of Natural Resources  
11 approach to this issue?

12 Now, Mr. Chairman, I trust you have a  
13 copy of what is Exhibit 4 before you, the Class  
14 Environmental Assessment. If you turn to page 93 of  
15 that document you will see an admission by the Ministry  
16 of Natural Resources that the use of herbicides and  
17 insecticides for tending and protection may create  
18 concerns for possible health effects among local  
19 residents and others and the sentence goes on. But as  
20 will be made clear in my comments, and indeed the  
21 admissions made by Ms. Murphy in her factum, the  
22 Ministry of Natural Resources is not calling any  
23 evidence with respect to this issue, save and except  
24 with respect to the issue of the federal and provincial  
25 regulatory regime regarding pesticides.

1                   We say the Environmental Assessment Act  
2                   requires more than that from the proponent. In  
3                   paragraph 20, for example, of the Ministry of Natural  
4                   Resources' Statement of Fact and Law, the Ministry  
5                   concedes that the potential human health effects of  
6                   pesticides are a relevant enquiry for this Board. Two  
7                   paragraphs later, in paragraph 22, the Ministry of  
8                   Natural Resources proceeds to tell this Board that what  
9                   its evidence will be is that there are other laws that  
10                  deal with this issue and, therefore, this Board should  
11                  not expect any further evidence from the Ministry on  
12                  this matter. And there are similar comments in  
13                  paragraphs 50, 51 and 52 of the Ministry factum.

14                 Now, in paragraph 32 of the Ministry's  
15                 factum they allege that what we are complaining about  
16                 is that the Ministry has not provided sufficient detail  
17                 on the issue of potential human health effects.

18                 Well, with all due respect, I don't think  
19                 that is the case. When we characterized the Ministry  
20                 of Natural Resources' evidence on this issue as wholly  
21                 inadequate in our Notice of Motion, I think it's fair  
22                 to say we were being charitable. Any fair reading of  
23                 the Ministry material - I'm talking now of Panels 12  
24                 and Panels 13, as well as the Exhibit 4, the  
25                 Environmental Assessment Document and, as well, the

1 very clear admissions of Ms. Murphy in the Statement of  
2 Fact and Law - one can only be led to the conclusion  
3 that evidence on potential human health effects of  
4 pesticides is wholly absent from the Ministry case.

5 Now, if I could direct your attention to  
6 Volume I of the Panel 12 evidence -- excuse me, Panel  
7 13, page 76. You will note in paragraph 32 that what  
8 the Ministry notes is that in making choices between  
9 the various tending and protection options, the forest  
10 manager needs some basic information on potential  
11 effects of the pesticides that are registered and  
12 approved for use and, indeed, the Ministry proposes to  
13 give evidence on terrestrial and aquatic effects.

14 However, having admitted that the forest  
15 manager needs information about the effects of these  
16 products, MNR has decided arbitrarily to deprive this  
17 tribunal and the public and the parties before this  
18 Board of any information about the potential human  
19 health effects of these products that the Ministry  
20 readily acknowledges are of public concern.

21 It is our submission, Mr. Chairman, that  
22 the Environmental Assessment Act requires more than  
23 this from proponents and it is our further submission  
24 that this Board has the authority to require it.

25 THE CHAIRMAN: Mr. Castrilli, I don't

1 want to pre-empt any of your argument, but how do you  
2 reconcile that position with the fact that if any of  
3 the opposition parties chose to call that evidence on  
4 their own, and if the Board felt that you were correct  
5 in your interpretation, the Ministry's case would just  
6 go in absent that evidence and the opposition could  
7 make their points, so to speak, on the evidence they  
8 wish to call and, on that basis, the Board would be  
9 required to make up its mind on the acceptability of  
10 the assessment, as opposed to the Board being entitled  
11 to the evidence and it's the Ministry's obligation to  
12 provide it?

13 MR. CASTRILLI: Well, let me see if I  
14 understand what you mean by opposition. Do you mean by  
15 opposition my clients--

16 THE CHAIRMAN: No.

17 MR. CASTRILLI: --or do you mean any of  
18 the other parties who might in fact be in support of  
19 the Ministry?

20 THE CHAIRMAN: Any of the other parties.

21 MR. CASTRILLI: Well, let's deal with us,  
22 FFT, first. And I do deal with this later but I'll  
23 certainly respond to your question now.

24 Our role in this hearing is to produce  
25 rebuttal evidence. If there is nothing to rebut,



1       there's no evidence to call. So that takes care of us.

2                       And with respect to other parties, I  
3       don't know what my friend Mr. Campbell is planning on  
4       doing, perhaps he will tell you; I don't know what my  
5       friend Ms. Conk is planning to, do perhaps she will  
6       tell you. But my understanding from reading their  
7       factum - and perhaps you can draw your own conclusions,  
8       Mr. Chairman - if you look at paragraphs 40 and 41 of  
9       the OFIA factum it doesn't appear to me that they are  
10      planning on calling any evidence other than the  
11      evidence that the Ministry of Natural Resources is  
12      going to call which is simply: There is a federal and  
13      provincial regulatory regime out there, period, thank  
14      you very much.

15                      So in those circumstances, Mr. Chairman,  
16      it is my view that that does not constitute any  
17      evidence at all on the issue of human health effects.

18                      So we can talk about this now just as  
19      easily as talking about it later. I'm suggesting the  
20      reason why we brought the motion is that I believe it's  
21      an issue that should be dealt with now so that we don't  
22      come to a complete impasse much further down the line.

23                      THE CHAIRMAN: Okay.

24                      MR. CASTRILLI: But I will be coming back  
25      to that issue to elaborate on those points, but I

1 appreciate your comment.

2 Now, Mr. Chairman, the Berglin decision  
3 which is referred to at paragraph 78 of our factum at  
4 page 26 interpreting the National Environmental Policy  
5 Act simply notes on this issue of human health effects  
6 that no subject -- paragraph 76 is -- sorry, paragraph  
7 78 is at the bottom of page 26 of our factum. Just  
8 quoting from the first line that we quote there:

9 "No subject to be covered in an  
10 environmental assessment..."

11 One can use our terminology instead of  
12 the U.S. terminology:

13 "...can be more important than the  
14 potential effects of a government program  
15 upon the health of human beings."

16 Now, having said that, let me go on to my  
17 second point. What are the statutory obligations on  
18 the Ministry of Natural Resources under this statute?

19 Now, the Ministry argues both in its  
20 Panel 12 and Panel 13 evidence summaries that it is,  
21 and this Board should be entitled to rely upon the  
22 registration and process of the federal government  
23 under the Pest Control Products Act and the process  
24 with respect to classification under the Pesticides Act  
25 of Ontario for the purposes of obtaining approval for

1 its undertaking. As a result of that, it says that it  
2 need not duplicate the obligations imposed upon, for  
3 example, registrants under federal law with respect to  
4 demonstrating human health safety of these products.

5 Now, so that there's no misunderstanding  
6 about what it is we are asking in our relief, FFT is  
7 not asking the Ministry of Natural Resources to  
8 duplicate tests performed by pesticide registrants, but  
9 in terms of what the Environmental Assessment Act  
10 requires, one does not have to reinvent the wheel in  
11 order to comply with the statute. These products - and  
12 they are set out in our Statement of Fact and Law,  
13 there are nine of them - have never been subject to an  
14 environmental assessment under federal or provincial  
15 law, have not been the subject of hearings under either  
16 of those statutes, and have not been compared with  
17 alternatives in the manner set out by the Environmental  
18 Assessment Act.

19 THE CHAIRMAN: Sorry, what was the last  
20 one again?

21 MR. CASTRILLI: That none of the nine  
22 products have been compared with alternatives in the  
23 manner set out and required by the Environmental  
24 Assessment Act.

25 MR. MARTEL: The second point, what was

1       that? The first one was never tested...?

2                   MR. CASTRILLI: The first one was never  
3       subject to an environmental assessment under federal or  
4       provincial law, and the second point was: Have not  
5       been subject to hearings under either federal or  
6       provincial law; and, the third one is: Have not been  
7       compared with alternatives in the manner set out and  
8       required by the Environmental Assessment Act.

9                   So quite simply, Mr. Chairman, we take  
10      the position that notwithstanding the existence of  
11      federal and provincial law, the Ministry now has a duty  
12      under the Environmental Assessment Act to report upon  
13      these matters to the Board, the parties and the public.

14                  And, Mr. Chairman, I guess the easiest  
15      way to think about this is to analogize three  
16      concentric circles, or three doughnuts, if you like.

17                  The first and largest doughnut is the  
18      federal registration process. If you want to use the  
19      pesticide in Canada you have got to get through that  
20      first door and get a registration. Having gotten  
21      through that first door, all that really tells you is  
22      that that product is available for use in Canada.

23                  That brings you to the second doughnut  
24      and that doughnut is Ontario and the Pesticides Act.  
25      If you want to use -- and notwithstanding the existence



1 of federal registration nationally, if you want to use  
2 the pesticides that are registered federally in  
3 Ontario, you are going to have to be classified under a  
4 particular schedule and in particular instances you are  
5 either going to need a licence or a permit to use those  
6 products.

7 Now, in the normal course, Mr. Chairman,  
8 that would be pretty much all anybody needs to do in  
9 order to be able to use federally registered products,  
10 but that is not and is no longer the situation in  
11 Ontario, or at least that part of Ontario that is the  
12 subject matter of this hearing, timber management on  
13 Ontario Crown forests.

14 Our friends have very clearly in their  
15 application for approval set out what it is they are  
16 seeking approval for and in our Statement of Facts at  
17 the beginning of our factum we outline that with  
18 respect to the undertaking of tending, that is to be  
19 done with pesticides and herbicides -- insecticides and  
20 herbicides for protection and tending purposes,  
21 maintenance purposes.

22 That is the third doughnut that the  
23 Ministry of Natural Resources has to get over. They  
24 now must convince this Board, notwithstanding federal  
25 law, notwithstanding the Pesticides Act, that these

1 products are going to receive - I won't call it your  
2 seal of approval - but your -- this tribunal's review  
3 prior to approval and that clearly cannot simply mean  
4 rubber stamping the prior federal and provincial  
5 regulatory process.

6 And I say that in light of the following  
7 obligations that are set out in the Environmental  
8 Assessment Act. Firstly, the obligation that is  
9 clearly set out in Section 5(3) of the Environmental  
10 Assessment Act - and, Mr. Chairman, if I could just  
11 simply direct you to one particular subsection, it's  
12 actually set out in our book of authorities, but for  
13 convenience I'm looking at the Consolidation, Section  
14 5(3)(c):

15 "An environmental assessment submitted to  
16 the Minister pursuant to subsection 1  
17 shall..."

18 Not may, not might, not could be if they felt like it,  
19 but:

20 "...shall consist of:

21 (c) a description of..."

22 And then small (i):

23 "The environment that will be  
24 affected or that might reasonably be  
25 expected to be affected directly or

1 indirectly."

2 And, more particularly, Mr. Chairman, the  
3 nub of the dispute, sub-item 2:

4 "The effects that will be caused or that  
5 might reasonably be expected to be caused  
6 to the environment..."

7 And I am moving down to the bottom of  
8 that page in that section:

9 "...by the undertaking, the alternative  
10 methods of carrying out the undertaking  
11 and the alternatives to the undertaking."

12 Just stopping there. Section 5.3 says:  
13 Proponent, tell us about the effects. I don't think  
14 the language could be any clearer. So that's the first  
15 obligation under the statute.

16 The second obligation under the statute,  
17 Mr. Chairman, relates really to the general provisions  
18 that permit the Board at this stage of the inquiry to  
19 stand in the shoes of the Minister as a decision-maker.  
20 And we set out those requirements in the factum and I  
21 won't repeat them for the time being.

22 The third set of requirements,  
23 obligations that arise are from the Board's Rules  
24 themselves. And as you may have noted, I have set out  
25 in the factum one of those rules, Rule 4. Rule 4 says:

1 "Where any matter arises during the  
2 course of any proceeding that is not  
3 contemplated by these Rules, the Board  
4 may do whatever is necessary and  
5 permitted by law to enable it to  
6 effectively and completely adjudicate on  
7 the matter before it."

8 I will be coming back to the meaning of  
9 that in this context.

10 THE CHAIRMAN: How do you distinguish  
11 that rule which purports to deal with procedural  
12 flexibility, and your submission that that rule can be  
13 used to effect substantive flexibility?

14 MR. CASTRILLI: My response, Mr.  
15 Chairman, is that we are not doing anything other than  
16 asking for procedural compliance with the statute and  
17 that's what Rule 4 is about, that's what Section 5(3)  
18 is about.

19 So we are not asking for a substantive  
20 response to this, we are saying you have a procedural  
21 obligation under the statute to comply and do certain  
22 things and we are proposing a procedural solution.

23 THE CHAIRMAN: I guess I am just having  
24 difficulty understanding how what you are asking for is  
25 procedural compliance as opposed to your asking for



1 statutory compliance.

2 MR. CASTRILLI: I think, Mr. Chairman, it  
3 will become clearer when I get to the next issue to be  
4 dealt with. And so perhaps if you could hold off for a  
5 moment, I will come back to that.

6 Now, Mr. Chairman, my friend Ms. Murphy  
7 indicates that -- or makes certain submissions in  
8 paragraph 33 of her factum. Let me be clear, that in  
9 order to succeed on this motion we do not have to  
10 establish, as Ms. Murphy otherwise suggests in  
11 paragraph 33 of her factum, that Section 5(3) imposes  
12 statutory pre-conditions to this Board assuming  
13 jurisdiction.

14 I think it's clear this Board has  
15 jurisdiction on this matter and has now for almost a  
16 year. However, the Ministry's failure to comply with  
17 the statute has impaired the Board's ability to  
18 effectively and completely adjudicate on this matter  
19 as contemplated by Rule 4, and that is an issue that  
20 this Board is fully authorized to deal with.

21 Now, Ms. Murphy in paragraph 35 agrees  
22 that Section 5(3) sets out what must be placed before  
23 the Board or the -- excuse me, before the Minister or  
24 the Board and is a simple question of procedure. The  
25 section says you must do this; if you don't do that,

1       there is a mechanism for dealing with your failure to  
2       deal with it. Our motion is a proposed mechanism for  
3       ensuring that what Ms. Murphy recognizes should be  
4       before the Board in fact gets there.

5                   And the reason, Mr. Chairman, that the  
6       U.S. case law is applicable to the way this Board  
7       should be thinking about this issue is that it says  
8       very clearly that if a federal agency produces a  
9       document that is not in compliance with the statute,  
10      the federal agency cannot proceed with its undertaking  
11      and, if it tries to do so, the courts will enjoin it  
12      from proceeding.

13                   The Bergland case says that, the Calvert  
14      Cliffs case says that, and Ms. Murphy has conveniently  
15      provided me with the third case in the trilogy, the  
16      Hardin case says that as well. The Hardin case is  
17      referred to in the book of authorities of Ms. Murphy,  
18      dealt with under the Stein, Manitoba Court of Appeal  
19      decision of 1974. Hardin is the third case in the  
20      trilogy. They all say the same thing.

21                   So that under the Environmental  
22      Assessment Act the proponent must satisfy the Board  
23      that its environmental assessment and witness  
24      statements, since that is by the Board's jurisprudence  
25      part of the environmental assessment as well, meet the

1 requirements of the Act. And if the proponent does not  
2 do so, then it is open to this Board to prevent MNR  
3 from proceeding with that part of the undertaking that  
4 is not in compliance. That is the tie that binds the  
5 U.S. jurisprudence to this issue.

6 THE CHAIRMAN: So you are taking the  
7 position or making the submission that various aspects  
8 of the Ministry's case in terms of its undertaking are  
9 severable from each other?

10 MR. CASTRILLI: Oh, yes.

11 THE CHAIRMAN: Okay.

12 MR. CASTRILLI: So that there is no  
13 mistake, we are not saying that their failure to comply  
14 on this issue affects their entire undertaking, but it  
15 certainly does affect that part of the undertaking that  
16 relates to pesticides and herbicides.

17 THE CHAIRMAN: How does it affect the  
18 acceptability of the environmental assessment as one of  
19 the two decisions that this Board is charged to make a  
20 finding upon, the other being whether or not the  
21 undertaking should proceed?

22 And if the environmental assessment is  
23 held to be insufficient or unacceptable as to part,  
24 what does that do with regards to the overall  
25 acceptability of the EA when you take a look at the

1        wording of Section 12?

2                    MR. CASTRILLI: Well, I think the bottom  
3        line is that what it means is that that part of the --  
4        or that part of the Ministry's application cannot  
5        receive an approval. That is the only interpretation  
6        that's conceivable in the circumstances.

7                    THE CHAIRMAN: Well, just to pursue this  
8        area for a moment. If in the course of providing the  
9        tribunal with its environmental assessment which, as  
10       you have indicated, under the Board's jurisprudence  
11       includes both the written documentation and the  
12       evidence adduced at the hearing, and one part of that  
13       environmental assessment is deemed to be insufficient  
14       for whatever reason, either no evidence is called  
15       whatsoever or the evidence that is called is in the  
16       Board's view not sufficient to meet the statutory  
17       requirements of the Act, is it your submission that a  
18       Board just deletes that portion of the EA relating to  
19       the area which is deemed to be insufficient and  
20       proceeds on to make its second decision on whether or  
21       not an undertaking should proceed with respect to the  
22       remainder, or it can't proceed to that second decision  
23       at all?

24                    And from what I gather you are saying,  
25        it's the former, that it can delete part and proceed on



1 with what's left. How do you make the judgment call as  
2 to there is enough left that the whole undertaking  
3 should not fail?

4 MR. CASTRILLI: I think that gets you  
5 into forestry principles more than legal principles in  
6 this case, but I think --

7 THE CHAIRMAN: Well, forget about this  
8 case, just in general terms. Is it a proposition that,  
9 where possible, you can sever the environmental  
10 assessment from various elements making up the entire  
11 assessment, you can chuck out parts and proceed with  
12 what's left, or at some stage is it a situation where  
13 if a material part fails the whole application fails?

14 MR. CASTRILLI: I won't discount the  
15 possibility that if you had such a giant gap in the EA,  
16 that we weren't simply talking about -- let's say it  
17 was a Mack truck-sized gap in the EA, then I think at  
18 some point, yes, the entire undertaking and the entire  
19 capacity of the Board to grant an approval is unlikely  
20 to proceed.

21 I don't think we have a Mack truck-sized  
22 gap in the entirety of all the areas they are seeking  
23 approval for. What we do have, however, is a Mack  
24 truck-sized gap with respect to pesticides and  
25 herbicides. And it's that part of the undertaking that

1 is in jeopardy.

2 THE CHAIRMAN: And are you indicating  
3 that that is covered by the wording in Section 12, sub  
4 (2), sub (c) where the Board is required to hold a  
5 hearing with respect to the acceptance, or amendment  
6 and acceptance of the environmental assessment?

7 Are you making the submission, Mr.  
8 Castrilli, that in the event that part of the EA is  
9 held to be unacceptable, the Board would amend the EA  
10 to the extent of considering what's left as the EA for  
11 which it could then accept as amended?

12 MR. CASTRILLI: I think that's fair.

13 THE CHAIRMAN: Okay.

14 MR. CASTRILLI: Could I have one moment's  
15 indulgence?

16 THE CHAIRMAN: Yes.

17 MR. CASTRILLI: Thank you, Mr. Chairman.  
18 I'm ready to proceed.

19 Now, Mr. Chairman, in case you are  
20 keeping score I am still on my point two, the issue of  
21 the statutory obligations under this statute that are  
22 imposed upon the Ministry of Natural Resources.

23 I want to suggest to you and to the  
24 members of the panel that the Ministry's obligations  
25 under the statute with respect to this particular

1 issue, herbicides and pesticides, are also suggested by  
2 what matters the Ministry have dealt with, particularly  
3 in light of the fact they are also dealt with under the  
4 Pest Control Products Act. You will note, if you have  
5 read the -- you may have read the so-called Ritter  
6 Document, and among the things that are dealt with are  
7 environmental effects with respect to a registration.

8 Now, in various paragraphs of its factum  
9 and, in particular, paragraphs 30 -- 39, excuse me, 40,  
10 41, 53, 54, 55 and 56 the Ministry makes the claim that  
11 we are asking them to do, in effect, a survey of all  
12 knowledge on this issue. I think it's paragraph 53 can  
13 be fairly characterized that way. And paragraph 56 of  
14 the Ministry factum suggests that it is unreasonable to  
15 ask the Ministry to produce information where the  
16 Ministry does not intend to rely on the statements that  
17 may be found in such documents.

18 Now, I think that kind of position cannot  
19 square with Section 5(3). The reason it cannot square  
20 with Section 5(3) is as follows:

21 What the Ministry has forgotten in making  
22 such submissions to this Board is that Section 5(3)  
23 obligates them, requires them to report upon effects.  
24 It obligates them as part of their application for  
25 approval to deal with an issue that in the normal

1 course and if this were a piece of civil litigation,  
2 which it isn't, they would not be obligated to address  
3 at all except in reply. I'm going to come back to this  
4 issue when I get to the compellability issue, but I  
5 just wanted to raise that at this point in time because  
6 it reveals a complete misunderstanding of what Section  
7 5(3) is all about.

8 The relief that we seek is based on what  
9 the Environmental Assessment Act expects from  
10 proponents. There is nothing unreasonable in expecting  
11 the Ministry of Natural Resources to produce a report  
12 on human health effects for the nine products it  
13 proposes to use. They have already in fact done such a  
14 report for environmental effects of those same nine  
15 products and they have a witness who is going to  
16 testify on the contents of that environmental effects  
17 report.

18 Now, Mr. Chairman, you have to ask  
19 yourself the question: Why is the Ministry of Natural  
20 Resources doing that? If the Ministry's position is  
21 that they can do whatever it wants on the issue of  
22 effects since it is already dealt with -- or that issue  
23 is already dealt with by other laws, why did the  
24 Ministry produce any evidence on effects on the  
25 environment as it clearly admits it did in paragraph 70



1 of its factum? That is an issue that the Ritter  
2 Document tells us has already been dealt with under the  
3 Federal Pest Control Products Act.

4 It's our submission, Mr. Chairman, that  
5 the Ministry produced the ESSA document because the  
6 Ministry knows the issue of environmental effects is  
7 expected to be dealt with under Section 5(3). Is it  
8 unreasonable to expect MNR to recognize that human  
9 health effects are also expected to be dealt with? Was  
10 the Ministry taken by surprise on this issue, if I can  
11 put it in those terms?

12 I suggest that the Ministry has already  
13 told us in their Environmental Assessment Document of  
14 1987 and previous drafts going back to late 1983, that  
15 it recognized that there are human health concerns  
16 connected to pesticide use. It's what the reference  
17 that I gave as an example at page 93 of the  
18 Environmental Assessment clearly admits.

19 What the Ministry has given the Board is  
20 half a loaf on this issue; the Environmental Assessment  
21 Act and what the public expect is the other half of the  
22 loaf.

23 Now, Mr. Chairman, in any event the  
24 Ministry has in fact told you everything that it is  
25 going to produce as evidence on the issue of human

1 health effectst. We say that it has told you that it is  
2 going to produce no evidence on this issue other than  
3 argument on the existence of other federal and  
4 provincial laws. We say, therefore, that the Board  
5 knows now what it will know at the end of MNR's case,  
6 that there will be no evidence on the issue of  
7 potential human health effects.

8 Let me ask a rhetorical question. What  
9 can or should the Board do about this state of affairs?  
10 It seems to me, Mr. Chairman, there are three options:

11 First, the Board could ask the Ministry  
12 to remedy that deficiency now; secondly, the Board  
13 could grant our motion; third, the Board could wait  
14 until the end of MNR's case at which time it could  
15 entertain a motion for non-suit on the issue of any  
16 approval for the use of pesticides.

17 We think it's more reasonable for the  
18 Board to do either Item 1 or Item 2 at this stage. We  
19 also understand the Board's preference, Mr. Chairman,  
20 that where an issue like this occurs respecting  
21 Environmental Assessment Act deficiencies it prefers  
22 that the matters be dealt with as promptly and be  
23 raised as promptly as possible and that's why we have  
24 done what we have done. Andf, therefore, contrary to  
25 paragraph 23 of Ms. Murphy's factum this issue is ripe

1 for consideration now.

2 Now, Mr. Chairman, I had noted at the  
3 outset there were four major issues I wanted to deal  
4 with in relation to the arguments of my friends and the  
5 first -- of the remaining two, the first one I would  
6 like to deal with is the issue of whether the Ministry  
7 of Natural Resources having failed to produce  
8 information on the potential human health effects of  
9 the products it proposes to use can be compelled to  
10 call a witness of its choice and produce a witness  
11 statement addressing those issues. Let me deal with  
12 that, being the third item in my response to my  
13 friends' factums; Compellability of witnesses and  
14 evidence production.

15 Now, this really applies to all three  
16 factums, the OFIA, the Ministry of Environment and the  
17 Ministry of Natural Resources and just quoting from the  
18 OFIA one since it is the first one I got. It states  
19 the general proposition -- this can be found in  
20 paragraph 21 of their factum:

21 "That the general rule is that the  
22 presentation of evidence, including the  
23 calling of witnesses, is the function of  
24 the parties to a proceeding and not that  
25 of a court and that courts and

1 administrative tribunals have no power of  
2 their own motion and without the consent  
3 of all parties to direct that further  
4 evidence be given."

5 That I think is the essence of the  
6 proposition and the position of all three of my friends  
7 and, surprisingly enough, or perhaps not so  
8 surprisingly all of my friends cite essentially the  
9 same authorities for this proposition. And if you  
10 wanted a quick and ready reference to the references  
11 the, OFIA submissions at Tabs 2, 3, 4, 5 and 8  
12 essentially contain all of the authorities that I think  
13 really can be said to be relied upon by all three of my  
14 friends.

15 There is, however, a problem with all of  
16 the authorities cited by my friends and it's a problem  
17 for them, not a problem for me, and that's that they  
18 are not relevant to the context within which we find  
19 ourselves; namely, an administrative hearing under the  
20 Environmental Assessment Act. And there are  
21 approximately 11 things wrong with their argument and I  
22 am going to deal with them in order.

23 First: This is not - and I underscore  
24 not - civil litigation or consensual arbitration or an  
25 appeal. Those are not things we are involved in in



1       these proceedings. We are dealing with questions of  
2       public law, public interest and not private interests.

3               In civil litigation you expect the  
4       parties to frame the issues, but that is clearly not  
5       this situation. The Environmental Assessment Act  
6       frames the minimum requirements that must be met by a  
7       proponent seeking an approval. In a civil proceeding,  
8       Mr. Chairman, there is no overriding statutory  
9       framework that requires the production of certain  
10      information as a condition precedent to approval. The  
11      Environmental Assessment Act requires more of an  
12      applicant than civil litigation requires of a plaintiff  
13      and as a result, Mr. Chairman, the case law cited by my  
14      friends, in particular for example, the re: Enoch case  
15      at Tab 3 or the re: Fraser case at Tab 4 are simply  
16      not helpful to my friends or to this Board.

17             Let me set out the reasons why I say  
18      that. First of all, all of these cases or both of  
19      these cases were private interest civil litigation.  
20      They predate the advent of a modern, complex  
21      administrative statute like the Environmental  
22      Assessment Act where substantive, positive statutory  
23      obligations are imposed upon applicants to produce  
24      specific information in connection with an approval  
25      sought.

1                   If you wanted to think about it as an  
2                   analogue, there is no analogue in the context of civil  
3                   litigation, for example, the Section 5(3) or to a  
4                   number of other sections in the Environmental  
5                   Assessment Act such as Section 11, et cetera. And the  
6                   reason is that the Environmental Assessment Document is  
7                   meant to be a benchmark technical decision-making or  
8                   decision-permitting document for the Board. It's not  
9                   the only thing, but it's where you start. No analogue  
10                  to that in civil litigation.

11                  Secondly: My friends cite no case law  
12                  pertaining to administrative proceedings decided by the  
13                  courts. There is no authority for the proposition in  
14                  paragraph 21 of my friends' factum where they say that  
15                  the general proposition applies to administrative  
16                  tribunals. We say there is no case law with respect to  
17                  administrative tribunals.

18                  Third: The text references relied upon  
19                  by my friends in particular and, for example, Sopinka  
20                  and Lederman, Williston and Rolls, in Sopinka, The  
21                  Trial of an Action, et cetera. All of these are more  
22                  or less relied upon by my friends, all suffer from the  
23                  same defect. These texts and the discussions they are  
24                  about are about civil actions; they are not about  
25                  administrative proceedings under a modern, complex

1 administrative statute with positive, substantive  
2 obligations under them.

3 And, in particular, Mr. Chairman, when  
4 you look at the text references they rely upon cases  
5 such as re: Enoch, a case of some 75 or 80 years  
6 vintage about private consensual arbitration or the  
7 Fraser case which was about an appeal. So if the case  
8 law does not help my friends, Mr. Chairman, the text  
9 writers take them no further.

10 Fourth: My friends, particularly the  
11 OFIA, prefaced paragraph 21 of their argument with the  
12 indication that the general rule is that a tribunal or  
13 a court cannot direct that evidence be called.  
14 However, as my friends are well aware, even in civil  
15 litigation there are exceptions to the general rule and  
16 some of those exceptions are in fact referred to at Tab  
17 5 of the Williston and Rolls text to be found and  
18 relied upon by my friends, the OFIA.

19 It is our submission that in the context  
20 of the statutory framework and the positive, statutory  
21 obligations imposed upon proponents under the  
22 Environmental Assessment Act along with the Board's  
23 Rules form a further class of exceptions to the general  
24 rule set out by my friends.

25 Fifth: I think it's important to look at

1        what those civil litigation cases were in fact dealing  
2        with. The fundamental underpinning of the cases cited  
3        by my friends, just take for example the re: Enoch  
4        decision. I'll just reference it, page 333 of that  
5        decision was that:

6                        "If a court were permitted to direct the  
7                        calling of a party's evidence, the civil  
8                        rights of a man might be decided by  
9                        evidence given by persons whose personal  
10                      credibility and the accuracy of whose  
11                      statements he would have no right to test  
12                      by cross-examination because the witness  
13                      would be his own."

14                      That is the fundamental proposition they  
15        are putting to this tribunal. The problem is that the  
16        proposition -- or the case that that proposition arises  
17        from is not this case. Cases like re: Enoch are based  
18        upon not forcing a party to call a particular witness -  
19        actually in that case it was a lay witness - to attest  
20        to particular facts because of issues of credibility  
21        and accuracy.

22                      That type of concern, Mr. Chairman, is a  
23        far cry from the order that we seek from this tribunal  
24        respecting expert witnesses. We have very carefully in  
25        the motion stated that the Ministry can choose the



1 witness or witnesses of their choice to deal with the  
2 issue of potential human health effects of the products  
3 that the Ministry clearly has quite a lot of faith in.

4 So our requested order is little more  
5 than the oral equivalent of the statutory obligation  
6 that already exists upon the Ministry to produce  
7 documentary information in the Environmental Assessment  
8 Act on these issues.

9 THE CHAIRMAN: Mr. Castrilli, isn't sort  
10 of a further exception to the principle in the re:  
11 Enoch case also the accepted practice with respect to a  
12 party calling a hostile witness?

13 In other words, as I understand that  
14 case, the concern of the court was, if the tribunal or  
15 the court directed the party to call a witness and that  
16 witness proved to be not in support of that party's  
17 position, his rights would be affected because he  
18 wouldn't be in a position to cross-examine.

19 MR. CASTRILLI: Yes, that's essentially  
20 what it...

21 THE CHAIRMAN: But there's often cases  
22 where a party may call a witness that turns out to be  
23 hostile, in which case the Rules, as I understand them,  
24 do allow in effect that party to cross-examine in any  
25 event.

1 MR. CASTRILLI: Yes, that's right.

2 THE CHAIRMAN: So what I'm saying is that  
3 there is even exceptions to the principle enunciated in  
4 the case you cited?

5 MR. CASTRILLI: Yes, that's right.

6 THE CHAIRMAN: Would you not agree?

7 MR. CASTRILLI: Yes. Sixth -- I'm sorry,  
8 let me wrap up five. If the Environmental Assessment  
9 Act requires the Ministry to do its homework, all our  
10 motion is asks is that the Ministry demonstrate that  
11 the homework has in fact been done. It's completely  
12 different from the civil litigation cases that are  
13 referred to by my friends.

14 Sixth: My friends cite no case law or  
15 authorities that would require the consent of all  
16 parties in the context of administrative proceedings  
17 before evidence could be compelled. Our application,  
18 Mr. Chairman, is uniquely applicable to proponents who  
19 seek approvals because it is proponents and only  
20 proponents who have special statutory obligations under  
21 the Environmental Assessment Act.

22 Seventh: Both the Ministry and the  
23 OFIA - and in the Ministry's factum it's at paragraphs  
24 27, 28, 29 and 30; and in the OFIA factum it is at  
25 paragraphs 25 and 26; they basically say the same

1        thing - suggest that the Environmental Assessment Act  
2        and Rule 4 do not together constitute authority in the  
3        Board to compel the calling of evidence by a proponent.

4                        These submissions, Mr. Chairman, both of  
5        the Ministry and the industry simply fail to give any  
6        meaning or content to the very clear statutory  
7        obligations imposed upon proponents by this statute. I  
8        noted earlier what those obligations are. They  
9        include, firstly, the production of information in  
10       compliance with Section 5(3); secondly, other  
11       provisions of the statute by which the Board stands in  
12       the shoes of the Minister; and, thirdly, the provisions  
13       of the rules which permit the Board wherever any matter  
14       arises during the course of any proceedings to do  
15       whatever is necessary and permitted by law to enable it  
16       to effectively and completely adjudicate on the matter  
17       before it.

18                      Now, my friends have cited to you no case  
19       law stating that in the context of this statute the  
20       motion I seek is not permitted by law. Mr. Chairman, I  
21       would suggest that what is not prohibited by law is  
22       permitted by law, particularly when read in the context  
23       of the statutory obligations upon the Ministry and  
24       various of the Board's rules.

25                      The Statutory Powers Procedures Act does

1 not set out all the matters that may be dealt with by  
2 the Board or, indeed any tribunal. And indeed, a quick  
3 review of the Board's rules would confirm that not all  
4 the matters dealt with in those rules arise from a very  
5 specific statutory authorization in the SPPA. What a  
6 review of the Statutory Powers Procedures Act does  
7 demonstrate is that the legislature recognized that  
8 tribunals are different from courts and serve different  
9 functions. And I think the Environmental Assessment  
10 Act provisions I have been referring you to further  
11 demonstrate that.

12 Eighth: There is one aspect to my  
13 friends' submissions referred to certainly by the OFIA  
14 and the Ministry of Natural Resources, perhaps my  
15 friend Mr. Campbell as well, with respect to the  
16 compellability of witnesses that we do agree with.

17 As stated in Sopinka and Lederman, it's  
18 at Tab 2 of the OFIA brief at page -- book of  
19 authorities at page 476:

20 "If a party such as the Ministry of  
21 Natural Resources comes into a forum with  
22 an imperfect case, the proper penalty is  
23 dismissal."

24 It's our submission, however, that the  
25 Board need not wait until the end of the case to make



1       that determination. If the Ministry will not produce  
2       such information and the Board does not direct that it  
3       be produced, then the Board is in a position to  
4       specifically deny an approval to the Ministry to use  
5       pesticides for timber management within the area of the  
6       undertaking.

7                       The argument of my friends that we must  
8       wait until the end of the hearing on this issue because  
9       everything submitted in evidence forms part of the  
10      environmental assessment is simply a misreading of the  
11      Board's jurisprudence. And those submissions by OFIA  
12      are at paragraphs 29 through 32 and in the Ministry  
13      factum, paragraphs 36 through 39.

14                     That jurisprudence, Mr. Chairman, is not  
15      applicable in a situation where there will be no  
16      evidence whatsoever from the proponent or indeed  
17      apparently anyone else with respect to an issue  
18      material to the approval the proponent seeks. The  
19      issue of potential human health effects of pesticides  
20      is material to the approval MNR seeks because Section  
21      5(3) of the Environmental Assessment Act says it is.

22                     THE CHAIRMAN: Mr. Castrilli, with  
23      respect to your last submission about the argument that  
24      if a party comes into the proceeding with an improper  
25      case, then the penalty is dismissal and that dismissal

1 in your interpretation, that part of the assessment  
2 could be made at this stage of the proceeding, or at  
3 least at the conclusion of the proponent's case.

4 MR. CASTRILLI: Yes.

5 THE CHAIRMAN: How is that affected in  
6 your view by the Board's own powers under Section 18  
7 sub (9) of the EA Act which allows the Board to appoint  
8 persons having technical or special knowledge of any  
9 matter to enquire into and report to the Board and to  
10 assist the Board in any capacity in respect of any  
11 matter before it?

12 MR. CASTRILLI: That is my point 11 and I  
13 will be coming to that in one moment. So with your  
14 indulgence, I will get there.

15 THE CHAIRMAN: Thank you.

16 MR. CASTRILLI: I anticipated that  
17 question.

18 No. 9: The fundamental difficulty with  
19 the submissions made by counsel for the Ministry of  
20 Environment, Mr. Campbell, which submissions were  
21 adopted by the Ministry of Natural Resources at  
22 paragraph 41 - both those submissions are predicated on  
23 the non-compellability of witnesses for the proponent -  
24 is that under Mr. Campbell's proposal an onus falls not  
25 upon the proponent where the statute places it, but

1 upon other parties to fill a gap that, for whatever  
2 reasons, the Ministry of Natural Resources does not  
3 want to fill in its own application.

4 Now, I mentioned this earlier, Mr.  
5 Chairman. I want to come back to it now. As  
6 intervenors to these proceedings our role is to rebut  
7 the case of the proponent. The nature of rebuttal  
8 evidence is that it responds to the case of the  
9 proponent. It will be highly prejudicial to our  
10 clients to place us or to place upon us by default any  
11 evidentiary burden whatsoever where no burden exists  
12 under the statute and, at the same time, to permit the  
13 Ministry of Natural Resources to evade it's very clear  
14 duties under the Act to prove its case on at least the  
15 balance of probabilities.

16 For FFT to call the first evidence in  
17 this hearing on this issue, I suggest to you that's  
18 quite conceivable that that would be the situation you  
19 would be faced - but that would not necessarily be our  
20 response - is to invite reply by the Ministry of  
21 Natural Resources. The problem with that really is  
22 that, in effect, you have the Ministry of Natural  
23 Resources putting in their case on this issue in reply  
24 and that is a course of action that I would not readily  
25 recommend to my clients. To do so would be to place

1 ourselves in the procedurally unfair position,  
2 manifestly prejudicial position of not having had the  
3 opportunity to know the case we have to meet before we  
4 brought our evidence.

5           Moreover, even if the Board would then  
6 allow us to call evidence in response to MNR's reply,  
7 it frankly is highly unlikely we would have the  
8 resources to call such evidence the second time. So  
9 that quite simply, Mr. Chairman, Mr. Campbell's  
10 submission and suggestion places the burden on the  
11 party least able to bear it and not where the statute  
12 says it belongs.

13           Tenth: I think it important in  
14 understanding that first submission, Mr. Chairman, to  
15 take a bit of a closer look at the jurisprudence that  
16 Mr. Campbell relies upon. He cites the Eastern Ontario  
17 case which is also relied upon by Ministry of Natural  
18 Resources at paragraph 41 of their factum. I submit  
19 that that case is not relevant to the context we find  
20 ourselves in.

21           Mr. Campbell says that case provides an  
22 established practice for a situation such as this. It  
23 says:

24           "Where an intervenor disagrees with a  
25 conclusion or judgment of the



1                   proponent..."

2                   And I would underline this:

3                   "...the intervenor is called upon to put  
4                   forward in evidence sufficient  
5                   information on the issue."

6                   He calls it a minimum level of  
7                   substantiation, which I believe is a quote from the  
8                   decision:

9                   "In order to induce the further calling  
10                  of evidence by someone on that issue."

11                  Now, Mr. Chairman that is referred to at  
12                  pararaphs 19 and 20 of Mr. Campbell's factum.

13                  Let's look at the -- I would like the  
14                  Board to look at the Eastern Ontario case very  
15                  carefully. It's found at Tab 4 of the Ministry's book  
16                  of authorities.

17                  MS. MURPHY: Ministry of Environment.

18                  MR. CASTRILLI: Ministry of Environment.  
19                  The particular pages involved are pages 21, 22 and 23  
20                  and, in addition, page B-4 and B-5.

21                  Their factum -- their book of authorities  
22                  is a light blue cover as well.

23                  THE CHAIRMAN: I'm sorry, what page was  
24                  that?

25                  MR. CASTRILLI: The pages are 21, 22, 23,

1 and B-4 and B-5. I am going to deal with them  
2 altogether and refer to them as we go along, and it's  
3 Tab 4 of that book of authorities.

4 Now, Mr. Chairman, the Eastern Ontario  
5 case did not involve a proponent who first tells the  
6 tribunal that there are no -- or that there are  
7 concerns, in this case human health concerns,  
8 associated with the use of pesticides, the proponent's  
9 preferred choice undertaking and then refuses to  
10 produce any evidence whatsoever about the potential  
11 human health effects of that preferred choice at all.  
12 And that case wasn't about health effects but that, in  
13 essence, is what it's about -- or that in essence is  
14 what it is not about.

15 Now, what Eastern did involve is a  
16 refusal by the proponent to put forward evidence about  
17 an alternative that the proponent regarded as  
18 unreasonable. The Eastern case is not about a  
19 proponent who refuses to put forward evidence on the  
20 effects of his proposed undertaking.

21 If the case stands for the proposition  
22 Mr. Campbell says it does, then all proponents have to  
23 do in future is tell the Board what their undertaking  
24 is and where to mail the approval.

25 The use of certain pesticides is a part

1 of the undertaking that the Ministry of Natural  
2 Resources is seeking approval for. Surely if the  
3 proponent is not obliged to put forward evidence on the  
4 potential human health effects of that choice, which is  
5 its choice on how to proceed with that part of the  
6 undertaking, then there is no meaning to Section 5(3)  
7 of the statute.

8 Mr. Campbell's proposition and proposal  
9 is only acceptable as an alternative to compelling the  
10 Ministry of Natural Resources to call a witness if it  
11 results, or if it does result in either the calling of  
12 the evidence by the proponent during its case in-chief  
13 or if no evidence is called by the Ministry of Natural  
14 Resources, everyone knowing with certainty that an  
15 order will issue from this Board denying the use of  
16 pesticides for timber management.

17 Mr. Campbell's proposal is not  
18 acceptable, I would suggest, in law or as policy if it  
19 results in the intervenors calling evidence first and  
20 then putting -- and then MNR putting in its case in  
21 reply. Such evidence is integral to the Ministry's  
22 application and like all such evidence it should be put  
23 in as part of its case in-chief. That is the necessary  
24 inference to be drawn from Section 5(3) of the Act that  
25 permits this Board to invoke Rule 4 in the manner that

1 we have proposed.

2 Mr. Chairman, the other problem with Mr.  
3 Campbell's suggestion and why it becomes even more  
4 unacceptable if the Ministry calls no evidence, is that  
5 if it does call no evidence but still obtains an  
6 approval because of other statutes having been  
7 satisfied, that would be sending a message to  
8 proponents that they can still expect to obtain  
9 approvals even if they produce environmental  
10 assessments that fail to address, as a matter of  
11 policy -- MNR policy, matters material to the approvals  
12 they seek and, secondly, clearly evade mandatory duties  
13 under the statute.

14 We don't think that's the kind of message  
15 this Board should be sending to the Ministry of Natural  
16 Resources. We think the Board should be sending a  
17 different message to the Ministry.

18 Eleven: This is the point that you  
19 raised earlier, Mr. Chairman, about the Board's ability  
20 to call witnesses on its own. You have raised it in  
21 your questions of me this morning, Mr. Chairman, and  
22 it's of course also referred to by several other  
23 counsel and; that is, that if the Board is unhappy with  
24 the state of the evidence, it could call its own  
25 witness under the Board's rules.



1                   And I would only note, Mr. Chairman, that  
2           this application for approval for timber management is  
3           the Ministry's and not the Board's. The Board is  
4           already in the process of calling one witness and it  
5           arguably should have been called by the Ministry of  
6           Natural Resources as its witness. And if the Board now  
7           has to call further witnesses because the Ministry will  
8           not, I think the Board runs a risk of being seen to  
9           become simply another party to these proceedings. We  
10          don't think the Board should take on such a role and  
11          there's a clear statutory mandate on the proponent to  
12          produce that evidence.

13                   In summation on this third general  
14          response to my friends then, Mr. Chairman, on the issue  
15          of compellability of witnesses, the civil litigation  
16          cases cited by my friends are not the law in this area.  
17          The law and the proper inferences to be drawn from it  
18          are to be found in the context of the Environmental  
19          Assessment Act and its Rules. They form a code, and if  
20          my friends want to think of it in the context of civil  
21          proceedings, the EAA constitutes an exception to what  
22          they call the general rules of non-compellability.

23                   At the same time, the proposal of Mr.  
24          Campbell and Ms. Murphy holds the potential for being  
25          both highly prejudicial to my client, as well as being

1 inefficient and for the reasons stated, Mr. Chairman,  
2 we believe the relief we seek to be within the  
3 statutory authority of this Board to order. It is the  
4 most direct, fair and equitable way to proceed to  
5 ensure that the integrity and the letter of the  
6 Environmental Assessment Act is maintained.

7 Mr. Chairman, I notice that it is now  
8 10:30 and I have been going on for an hour and a half.  
9 As you might imagine, I am not finished. This might be  
10 an appropriate place to take a break.

11 THE CHAIRMAN: Very well. We will take a  
12 20-minute break.

13 ---Recess taken at 10:35 a.m.

14 ---On resuming at 11:10 a.m.

15 THE CHAIRMAN: Thank you. Be seated,  
16 please.

17 MR. CASTILLI: Thank you, Mr. Chairman.  
18 I indicated at the outset of my comments that there  
19 were four responses I propose to make to the factums of  
20 my friends. We are now on, or about to embark on No.  
21 4, and that's the issue of the relevance of prior  
22 federal and provincial approvals.

23 The issue really, Mr. Chairman, is  
24 whether the Ministry of Natural Resources is  
25 statutorily obligated to do more than announce to the

1 Board that the pesticides it proposes to use are  
2 federally and provincially permitted.

3 The Ministry says that that is the only  
4 inquiry this Board need make with respect to the  
5 potential human health effects of such products or that  
6 they are obliged to provide you. We have indicated  
7 already that this Board, in our opinion, is a third  
8 tier of regulatory authority that the Ministry must  
9 satisfy with respect to the issue of potential human  
10 health effects of such products, and the reason we say  
11 that, as I noted at the outset, is because the wording  
12 of Section 5(3) is crystal clear. It says:

13 "Effects of the undertaking must be  
14 reported upon by the proponent."

15 Now, we say this in relation to the MNR  
16 submissions on this point for a number of other  
17 reasons - the number of which escapes me at the  
18 moment - but there are quite a few. Let me begin with  
19 No. 1.

20 Firstly: The Ministry of Natural  
21 Resources is the agency that the Environmental  
22 Assessment Act speaks to in these proceedings. It does  
23 not speak to Agriculture Canada, the administrator of  
24 the Federal Pest Control Products Act; it does not  
25 speak to Health and Welfare Canada, which also has a

1       role under that process; and, indeed, it does not speak  
2       to the Ministry of Environment, a regulator under the  
3       Pesticides Act.

4               Section 5(3) defines the Ministry of  
5       Natural Resources' responsibilities and its  
6       responsibilities are not limited to compliance with  
7       other federal and provincial laws.

8               Section 5 does not say only report upon  
9       effects if the products or activities are not otherwise  
10      the subject of other laws. Section 5 says report upon  
11      effects, period. And we will just make one note in  
12      this regard, Mr. Chairman.

13              At Tab 1 of the material of the OFIA,  
14      they refer to a recently announced federal registration  
15      process review. I would emphasize, Mr. Chairman, that  
16      that review is in relation to the process only and not  
17      in relation to the products themselves. It is not a  
18      substitute for compliance under this statute.

19              Secondly: The mere existence of, for  
20      example, the Pest Control Products Act regulations  
21      which are set out in the Ministry of Natural Resources'  
22      Statement of Fact and Law at paragraphs 7 through 11,  
23      tells this Board nothing about the effects of the  
24      particular products themselves. Was this process  
25      described in those sections the one these products went



1 through? We don't know that, you don't know that.

2 We would note, Mr. Chairman, those  
3 regulations only came into force in 1972. Before 1972  
4 there were no federal regulations in this area.  
5 Products such as 24-D, for example, were on the market  
6 in the 1940s and 1950s. We have no idea from MNR what  
7 studies were prepared then or later, what studies were  
8 not done because they were not required at the time of  
9 initial registration, what gaps exist in the data, or  
10 what the studies say with respect to potential human  
11 health effects.

12 We also have no idea whether any of these  
13 products have ever been re-evaluated under federal law  
14 since the initial registration or what the data -- or  
15 whether any data gaps were filled.

16 As you know, Mr. Chairman, re-evaluation  
17 is a process that occurs after a pesticide is  
18 registered, but I emphasize that it is a process that  
19 may occur after registration has been authorized and we  
20 do not know whether it has occurred or what the results  
21 were.

22 So frankly, the Ministry of Natural  
23 Resources telling the Board about the Pest Control  
24 Products Act really tells us nothing about how or  
25 whether these products have gone through any type of

1 re-evaluation since registration or what requirements,  
2 in term of studies, they had to meet when they were  
3 originally registered, or what the studies or other  
4 literature say about effects. And, moreover, I would  
5 underscore that what the federal process does not tell  
6 us the provincial process does not improve upon.

7 Third: While even the Ministry of  
8 Natural Resources concedes that the Board should  
9 consider "the reasonable alternatives to the use of  
10 pesticides", it is a statement found in the Statement  
11 of Evidence for Panel 12, for example, paragraph 3 and  
12 also in paragraphs 59 and 71 of the Ministry's  
13 Statement of Fact and Law. The Ministry's refusal to  
14 provide evidence on the potential human health effects  
15 of the products it proposes to use deprives the Board  
16 of the very opportunity to make such a comparison  
17 meaningful.

18 Mr. Chairman, you will recall in our  
19 Statement of Fact and Law the reference to the Sam  
20 Smith case which underscored that the issue of  
21 alternatives was one of the cornerstones of this  
22 Environmental Assessement Act, and I will be coming  
23 back to that in context of another point, but I just  
24 wanted to make it at this particular point.

25 THE CHAIRMAN: You might bear in mind,

1 Mr. Castrilli, that the Sam Smith case was the first  
2 case under the Act and I think the Board in that case  
3 was very much feeling its way through that legislation.  
4 There, of course, have been a number of cases since.

5 That is not to say, that principles  
6 enunciated in that case are no longer applicable, but  
7 it should be taken in the context that it was the first  
8 case, there was no precedent before it and there have  
9 been certainly consideration of issues like  
10 alternatives since then.

11 MR. CASTILLI: Fair enough. Fair enough.  
12 But I would submit, Mr. Chairman, that it is simply not  
13 possible for the Board to make a reasoned choice among  
14 the competing options if you do not know what the  
15 effects or the risks from the proponent's preferred  
16 choice. That I think is the unique quality of the  
17 Environmental Assessment Act -- or a unique quality of  
18 the Environmental Assessment Act, that the Ministry's  
19 response to our position seeks to undermine.

20 With respect to tending treatments,  
21 pesticides are the tools that MNR uses over the largest  
22 geographic area of the undertaking, and I would simply  
23 refer by way of reference to pages 118 and 171 of the  
24 Panel 12 evidence for that, and in the majority of  
25 situations.

1                   Whatever else the Ministry wants to talk  
2           about with respect to effects, it certainly has an  
3           obligation to talk about the potential human health  
4           effects of the preferred method of doing the  
5           undertaking, and we say the Board simply cannot fulfill  
6           its obligations under the Act or, more importantly,  
7           provide MNR with approval, unless MNR provides you with  
8           the information you need in order to make the  
9           comparison of health effects for the preferred choice  
10          versus any health effects for any alternatives.

11                   Fourth: Argument about the existence of  
12          other federal and provincial laws is not evidence about  
13          the potential human health effects of any particular  
14          product, but this is really all the Ministry of Natural  
15          Resources intends to tell this Board, and I think  
16          that's made quite clear in the factum of Ms. Murphy at  
17          paragraphs 22, 49, 50, 51, 52 and 53.

18                   We would suggest that this hardly creates  
19          any presumption of law as suggested by the Ministry in  
20          paragraphs 53 and 59. The Environmental Assessment Act  
21          was enacted to deal with the deficiencies in other laws  
22          that either did not authorize hearings or deal with  
23          alternatives or related matters.

24                   It is our submission that judicial  
25          interpretation of environmental assessment law makes it



1 clear that the courts have rejected the notion of there  
2 being any presumption of law at work in this area, and  
3 this is even illustrated by case law that has been  
4 conveniently provided by Ms. Murphy in her book of  
5 authorities, Tab 8, the Stein case, decision of the  
6 Manitoba Court of Appeal referring to Environmental  
7 Defence Fund vs. Hardin.

8 The Hardin case is summarized at pages  
9 494 to 496 of the Stein decision and it makes it clear  
10 that the courts upheld that:

11 "Given the objectives of environmental  
12 assessment law, to ensure that government  
13 agencies address the impacts of their  
14 programs on health and environment in the  
15 context of environmental assessment  
16 requirements, the courts will be loath to  
17 accept the argument that the existence of  
18 prior federal law..."

19 And in the Hardin case it was federal  
20 pesticide law:

21 "...eliminates the need to comply with  
22 Environmental Assessment Act  
23 requirements."

24 I am just quoting from page 495 of that  
25 decision:

1 "Registration or approval of an  
2 insecticide by a statutory agency does  
3 not exempt the program from compliance  
4 with NEPA."

5 So that the Hardin case, like the  
6 Bergland case and the Calvert Cliffs decisions, all  
7 stand for the same proposition; they are all  
8 Environmental Assessment Act cases that reject the  
9 presumption of law theory.

10 Agencies including, I would submit, the  
11 Ministry of Natural Resources are expected to comply  
12 with Environmental Assessment Act requirements or  
13 environmental assessment law requirements and not hide  
14 behind other laws. And it is for these reasons that  
15 the British Columbia cases are distinguishable because  
16 they were not interpreting environmental assessment  
17 legislation.

18 Fifth: The Ministry also suggests that  
19 its reliance on other federal and provincial laws and  
20 its invitation to this Board to treat their existence  
21 as prima facie evidence of acceptability does not  
22 constitute an improper delegation of the Board's  
23 authority to these other agencies. It's a proposition  
24 made by Ms. Murphy in paragraph 59 of her factum.

25 I would submit, however, that if the

1 Board inquires into the matter no further than whether  
2 there are other federal and provincial laws, then that  
3 is in fact delegation. These other agencies did not  
4 have the same statutory obligations as this Board, such  
5 as conducting a hearing under an environmental  
6 assessment statute, or dealing with the issue of  
7 alternatives, or any of the related matters to be found  
8 under the Environmental Assessment Act.

9 Therefore, I simply do not understand the  
10 Ministry's position and how the Board's not going any  
11 further than acknowledging the existence of these other  
12 agencies' processes serves to ensure compliance under  
13 this statute. In my opinion that is delegation.

14 Sixth: Even if the existence of these  
15 other laws was some evidence about the effects, as the  
16 Ministry suggests in paragraphs 59 and 68 of its  
17 argument, it could hardly by itself meet the persuasive  
18 burden of proof which lies upon the proponent. Having  
19 told the Board that it will call no other evidence  
20 unless someone else does, it is our submission that  
21 there would be no basis for an approval at the end of  
22 MNR's case arising from that evidence alone. It would,  
23 therefore, be open to anyone to non-suit MNR on this  
24 issue at that time.

25 Reliance on other parties to supply the

1 missing evidence MNR requires for an approval would  
2 appear to be wishful thinking on the MNR's part with  
3 respect to this issue.

4 In summary, Mr. Chairman, we submit that  
5 the reasons for granting our motion are many. We have  
6 no objection if the Board prefers to indicate to the  
7 MNR their dissatisfaction with the state of this  
8 evidence, or the state of the evidence on this issue  
9 and to first request them to voluntarily produce it.

10 We also have no objection to MNR calling  
11 this evidence at the end of their whole case. And I  
12 suggest that they can call the Panels 18 and 19 if they  
13 like, or they call them 12A or 13A if they prefer.  
14 However, failing a positive response from MNR, we  
15 believe the Board must send a message to proponents  
16 generally but, more particularly to the MNR, in  
17 particular on this case, that Section 5 of the  
18 Environmental Assessment Act is to be taken seriously  
19 especially where the issue is protection of human  
20 health.

21 For those reasons we would urge you to  
22 grant the requested relief.

23 Those are my submissions.

24 THE CHAIRMAN: Okay. Mr. Castrilli, just  
25 before you sit down, we have got a couple of questions



1       that we would like to put to you and that is: Assuming  
2       that the Board agreed with your position that evidence  
3       should be called to deal with the effects on human  
4       health of the use of pesticides in furtherance of the  
5       Ministry's undertaking, what in your view would  
6       constitute that evidence?

7                       And I am referring here specifically to  
8       what kind of evidence would you expect to be called in  
9       terms of existing studies, and I am talking about many  
10      of the scientific studies that have no doubt been  
11      carried on at various levels with respect to the  
12      individual products involved. And I think the reason  
13      we are raising this is you indicated at the outset of  
14      your argument you weren't asking for a reinvention of  
15      the wheel.

16                    MS. CASTRILLI: That's correct.

17                    THE CHAIRMAN: And you weren't asking for  
18      a repetition before this Board, at least that is what I  
19      think we interpreted your submissions to mean, of all  
20      of the production of the various studies in detail that  
21      may have been produced before any of the federal or  
22      provincial regulatory authorities that had the specific  
23      mandate for the regulation of pesticides.

24                    And I think we would like some further  
25      elucidation on your part as to what you expect should

1 the Board find favour with your submissions today.

2 MR. CASTILLI: Mr. Chairman, I recall I  
3 actually did mention this briefly in my submissions,  
4 but I have no problem with restating it.

5 The Ministry has produced a document, as  
6 you are aware - I presume it doesn't yet have an  
7 exhibit number - but it's the ESSA Report on the  
8 environmental effects of pesticides in timber  
9 management and it is my -- and in that report, as you  
10 are aware or as you may be aware - perhaps you are not  
11 yet permitted to be aware, since it is not yet  
12 evidence - but in any event, when you get to see it,  
13 that report deals with the environmental effects of the  
14 nine products that the MNR proposes to use within the  
15 area of the undertaking. And it seems to me that  
16 having produced a report like that with respect to  
17 environmental effects --

18 THE CHAIRMAN: You are talking natural  
19 environment other than human?

20 MR. CASTILLI: That's right. That's  
21 right. Having produced a report on "environmental  
22 effects" -- natural environmental effects, there would  
23 be no reason why it couldn't produce a report on human  
24 health effects in the same manner, deal with the same  
25 nine products, deal with the same issues.

1 I leave it entirely up to them how they  
2 want to do it and how they want to put it forward, but  
3 it seems to me that is a methodology that is already  
4 tried and true and why not do it that way. And I would  
5 add, plus a witness.

6 THE CHAIRMAN: And is it your submission  
7 that in the event that such a study was produced or a  
8 study referred to in the evidence which was the same  
9 study that was considered by one of these other  
10 regulatory agencies and this Board came to a different  
11 conclusion as to the meaning of the study - and I am  
12 talking about one here that might have been produced  
13 before one of these other agencies and considered by one  
14 of the other agencies - is it your position that this  
15 Board would be at liberty to arrive at a completely  
16 different conclusion than was arrived at by any of the  
17 other agencies and, in effect - and I'm trying to be  
18 careful with the wording - but, in effect, superseding  
19 or in a practical sense revoking the practical effect  
20 of such a registration for use by one of the other  
21 regulatory authorities?

22 MR. CASTILLI: Yes. And there is nothing  
23 unprecedented about that. That was the reason we  
24 included in our material the example of the Ministry of  
25 Environment's decisions on 245-T. As you know, 245-T

1 was not -- the registration for 245-T was not revoked  
2 by the federal government until about one or two years  
3 ago. However, the Ministry of Environment, under its  
4 authority under the Pesticides Act, substantively did  
5 the equivalent of revoking that registration by placing  
6 it in Schedule 1 and not authorizing permits for its  
7 use as early as, I believe it was 1981.

8 So it's quite clear. This is an area,  
9 first of all, of concurrent constitutional authorities.  
10 It is no doubt the province can more greatly restrict  
11 to the point of banning any product that's otherwise  
12 permitted to be used federally.

13 And our position is - and I use the  
14 example of the three concentric circles - I mean that  
15 quite literally. You now have that the authority to  
16 deal with the issue of pesticides and herbicides, in  
17 our opinion, as they would be applied with respect to  
18 timber management within the area of the undertaking,  
19 and you can do anything you feel is necessary in  
20 relation to that authority including, for example,  
21 imposing greater terms and conditions on the  
22 availability of those products for certain uses, or  
23 perhaps even decreeing in your final order that a  
24 certain product cannot be used.

25 And it is entirely open to you to come to

1 a different conclusion on a study that's otherwise been  
2 looked at by the Feds and they've come to an opposite  
3 view. And I think that's clear from the case law and  
4 that's clear from the practical activities of the  
5 Ministry of Environment over the years.

6 THE CHAIRMAN: And all of that is  
7 predicated that any such ruling would be applicable  
8 only to the use of the products within the area of the  
9 environment and for the uses suggested or intended by  
10 the Ministry with respect to their undertaking?

11 MR. CASTILLI: Yes, that's correct.

12 THE CHAIRMAN: Thank you, Mr. Castrilli.

13 MR. CASTILLI: Thank you, Mr. Chairman.

14 THE CHAIRMAN: Ms. Palowski, are you  
15 going to propose to read a statement or present a  
16 statement at this time?

17 MS. PALOWSKI: Speaking for NAN and the  
18 Windigo Tribal Council, we just want to make sure that  
19 NAN's submission is entered into the record and that  
20 the issues raised and the concerns raised are  
21 considered by the Board in their decision.

22 THE CHAIRMAN: In the written material  
23 filed?

24 MS. PALOWSKI: Correct.

25 THE CHAIRMAN: So you won't be adding



1 anything further by way of oral argument?

2 MS. PALOWSKI: Right.

3 THE CHAIRMAN: Very well.

4 MR. CASTILLI: Mr. Chairman, I wondering  
5 if I could have your indulgence. I understand Mr. --  
6 and I fully understand why Mr. Campbell would want to  
7 not only use the podium but also have access to the  
8 table, so perhaps you could give us two moments to just  
9 basically switch places.

10 THE CHAIRMAN: Very good.

11 Mr. Campbell?

12 MR. CAMPBELL: Mr. Chairman, I think if  
13 the panel members would have in front of them the  
14 Statement of Fact and Law filed on behalf of the  
15 Minister of the Environment, the book of authorities  
16 associated with that and the Environmental Assessment  
17 Document, those are the main items that I will be  
18 referring to and the Environmental Assessment Document  
19 only briefly perhaps.

20 I will also be making reference to a  
21 transcript. It's the transcript of Wednesday, March  
22 29th where the procedure whereby this motion came  
23 before the Board today was set. It's Volume 83 of the  
24 transcript, Wednesday March 29th. It isn't necessary  
25 for the Board to have that in front of it, I just want

1 to make passing reference to some comment there.

2 I think basically what I propose to do is  
3 to lead the Board through our Statement of Fact and Law  
4 providing some additional commentary on some of the  
5 matters addressed in that statement.

6 Just before starting into that, however,  
7 I think I should comment that it seems to me that Mr.  
8 Castrilli's main problem with his motion before you  
9 today is that his arguments have by and large proceeded  
10 from a position or an assumption that Section 5(3) has  
11 not been met.

12 Now, if all parties agreed that that was  
13 the case, then perhaps the whole argument of this  
14 motion would be moot, but what Mr. Castrilli in my  
15 submission does not give adequate weight to is the  
16 simple fact that all parties do not agree with his  
17 proposition that Section 5(3) has not been met and, in  
18 particular, the proponent, MNR, does not agree with  
19 that proposition.

20 And it is my submission, if I can reduce  
21 it simply to one proposition, it's my submission that  
22 what's before you today is a question of how to resolve  
23 that dispute: Has 5(3) been met, what's the evidence  
24 that the Board needs to resolve this dispute. That is  
25 how best to get it in front of the Board. That is the

1 question that is before you, what's the proper  
2 mechanism for resolving this dispute.

3 And it will be our submission that on  
4 this rather simple question that the proposal put  
5 forward by the applicant is inappropriate; that is,  
6 that the Board ought not to step into the ring along  
7 with everybody else and tell a proponent what evidence  
8 to call.

9 THE CHAIRMAN: Well, just before you go  
10 further, Mr. Campbell. Is there any dispute by any of  
11 the parties that the Ministry has taken the position  
12 that it is not going to provide further evidence on the  
13 effects of pesticides on humans, apart from referring  
14 to the registrations and the consideration by both the  
15 federal authority regulating pesticides and the  
16 provincial authority regulating pesticides?

17 I mean, is there any dispute about what  
18 evidence with respect to that question that the  
19 Ministry intends to call?

20 MR. CAMPBELL: I don't believe there is  
21 any dispute. I think what's being argued here,  
22 however, is not a question of what evidence is going to  
23 be called, it's a question of whether the proponent is  
24 entitled, in putting forward its case, to come before  
25 you and say: Here's the evidence we rely on, we take

1 the risk that it is or isn't sufficient for the  
2 purposes of the approval, the Board has to decide that.

3 And we may decide that intervenors raise  
4 matters in the course of this hearing that require us  
5 to come back in with more evidence but, for the moment,  
6 we have turned our mind to the matter, we have turned  
7 our mind to what 5(3) requires, our best judgment is it  
8 requires this, and we will stand and fall on that.

9 THE CHAIRMAN: Okay. And following along  
10 with what you are saying, is there any, in your view,  
11 dispute that under the definition section of  
12 environment set out in the Act, that it would cover  
13 things like effects on humans as opposed to any other  
14 aspect of the natural environment?

15 MR. CAMPBELL: No, and I don't think any  
16 party appearing in front of you today on this motion  
17 would dispute that proposition.

18 THE CHAIRMAN: Okay. So your submission  
19 essentially is, at this point in time the Board should  
20 not be deciding whether or not the Ministry has met its  
21 statutory obligation?

22 MR. CAMPBELL: Absolutely not, it should  
23 not be deciding that at this time.

24 THE CHAIRMAN: At this time. Okay.

25 MR. CAMPBELL: Nor has any evidence been

1 brought in front of it, either at this time including  
2 in support of this motion, which should lead you to any  
3 different conclusion. You should not operate in a  
4 vacuum on this matter.

5 THE CHAIRMAN: All right. Now, just  
6 taking the hypothetical for a moment, again this  
7 follows on from Mr. Castrilli's argument.

8 If the Ministry chose not to call any  
9 evidence -- any further evidence on effects on human  
10 health of pesticides, completed its case having adduced  
11 no further evidence than what has been alluded to to  
12 date, would it in your view be open at that point to an  
13 intervenor to request the Board to rule on whether or  
14 not, should it consider that there was an obligation  
15 for the Ministry to do so under 5(3), that any use of  
16 pesticides in connection with its undertaking should be  
17 prohibited?

18 In other words, it's therefore out of the  
19 assessment, the assessment is not complete with respect  
20 to that aspect and that gets into a question of whether  
21 or not these things are severable, but assuming for the  
22 moment it is, at that point in time, would it in your  
23 view be open to a party to move the Board to make that  
24 ruling?

25 MR. CAMPBELL: No.



1 THE CHAIRMAN: It would not?

2 MR. CAMPBELL: And the reason I say that  
3 is that the Board cannot rule in a vacuum of evidence  
4 on this matter. We may all have concerns about  
5 inappropriate use of pesticides; that is not the issue  
6 here, and there's no evidence in front of you as to how  
7 to resolve where you should come down on those concerns  
8 if they are raised in front of you.

9 But against that backdrop, the question  
10 that you are really asking me is: Can the Board rule  
11 on a non-suit with absolutely no evidence in front of  
12 it at all. And I think that before that sort of motion  
13 could be entertained successfully there would be an  
14 obligation on the party pressing that position to say:  
15 Look, there is at least some evidence here that you  
16 have got to worry about, you can't just throw it out  
17 because nobody particularly loves pesticides, you have  
18 got to have some evidence in front of you on which to  
19 come to some kind of conclusion. And I will be  
20 addressing that further in my submissions.

21 I just point out though that that's all  
22 we are talking about here is sort of a perception of  
23 concern. All that MNR has said in its EA is not that  
24 there are human health effects, but that the use of  
25 herbicides and insecticides for tending and protection

1 purposes may create concern for possible health effects  
2 among local residents and recreationists. That is the  
3 quote that my friend Mr. Castrilli is relying on. May  
4 create concern.

5 They are simply recording the fact that  
6 people have concerns about these things. That is no  
7 more a suggestion that there is no public health effect  
8 or there is a health effect to worry about; that is not  
9 evidence that has any probative value as to whether  
10 there is in fact a health effect which this Board needs  
11 to be concerned about.

12 Now, Mr. Chairman, I think I will turn  
13 directly to page 3 of my statement which goes back and  
14 it addresses some of these questions in a slightly  
15 different way and perhaps with a slightly different  
16 focus. But it seemed to us in looking at this matter  
17 that this application in fact only raises three fairly  
18 narrow issues and we have set them out at page 3 of our  
19 statement.

20 Before turning to them, I think it's  
21 essential that the Board in dealing with this  
22 application remember that this is not an application  
23 relating to whether there are in fact effects of  
24 pesticides -- health effects of pesticides. That may  
25 come later in this hearing, but that is not what this

1 application is about in front of you today. Now,  
2 having considered the matter we felt there were three  
3 issues. I am just going to basically read them from  
4 our statement.

5 First: Does the Environmental Assessment  
6 Board have jurisdiction to consider such matters as the  
7 potential environmental and human health effects of  
8 pest control products and formulations proposed for use  
9 in timber management and to impose terms and conditions  
10 with respect to the use of such products for timber  
11 management purposes within the area of the undertaking,  
12 notwithstanding that those products are otherwise  
13 federally registered and provincially classified and  
14 authorized for use in Ontario.

15 We will be submitting that the answer to  
16 that question is yes. That question really is in our  
17 statement, Mr. Chairman, as a result of remarks that  
18 you made that can be found at page 13795 of the  
19 transcript and which is in Volume 83 at lines 12 to 17  
20 where you state that:

21 "With respect to the questions of whether  
22 or not this Board would have the  
23 jurisdiction to deal with matters which  
24 are regulated by other agencies, both  
25 federal and provincial, that is a

1 question that the Board I think would  
2 have to, and I would encourage parties to  
3 make submissions on."

4 That was at the time this motion was  
5 first discussed before the Board and directions were  
6 sought for service.

7 Now, we submit that the issue raised,  
8 therefore, is one of whether the Board has the  
9 authority to impose additional terms and conditions  
10 and, as we say, we say the answer is yes.

11 The second issue we set out as follows:  
12 Is the procedure proposed by the applicant an  
13 appropriate response to the applicant's concern as to  
14 the adequacy of MNR's evidence in relation to pest  
15 control products. And we say the answer to that  
16 question is no.

17 And I guess again if I had to reduce it  
18 to one line, the reason we say it's no is because it  
19 doesn't matter whether this is a court, an  
20 administrative tribunal, whatever it is, it is a  
21 hearing and it is a hearing that is taking place within  
22 the context of an adversarial system of justice.  
23 Cutting aside all of the cases and whether it's a civil  
24 case or however else you want to characterize it, it is  
25 surely true that this is a hearing and it is taking

1 place within an adversarial context.

2 The Board is not in an inquisitorial  
3 role, it is here to receive evidence and make a  
4 determination. And my friend says: Well, in a normal  
5 civil case the parties define the issues. The mere  
6 fact that in this case the Act to some extent defines  
7 the issues, or to a great extent defines the issues,  
8 doesn't touch the point of what this proceeding is. It  
9 is still a hearing within the context of an adversarial  
10 system of justice.

11 THE CHAIRMAN: All right. How does that  
12 square, Mr. Campbell, with I think a long-standing  
13 practice of this Board, as well as I would suggest the  
14 joint boards, that the boards often view their role as  
15 are more than just adjudicating on facts put before  
16 them, and in areas in what they perceive to be areas  
17 involving the public interest where they feel that the  
18 evidence being brought before them is not sufficient or  
19 complete enough, the Board through the process in terms  
20 of questioning the various witnesses themselves, or in  
21 some cases in terms of retaining their own witnesses or  
22 experts for assistance, have in some way supplemented  
23 what they felt was necessary in order for them to  
24 properly adjudicate at the end of the day?

25 MR. CAMPBELL: Mr. Chairman, in my



1 submission, that doesn't detract from my argument one  
2 wit and the reason is this: All kinds of  
3 administrative tribunals have adopted their own  
4 procedures to suit their own particular tasks and to  
5 deal with the range of issues that their statute  
6 defines for them.

7 What I am talking about is much more  
8 fundamental than that. When they hold a hearing, they  
9 in the end are decision-makers; they in the end rely on  
10 a process which at its very root takes them out of the  
11 decision-making about how a case is conducted which  
12 doesn't clothe them in all of the trappings of a party.  
13 The minute the Board steps in and says: You must call  
14 a witness on this matter, in my submission, it is quite  
15 clear that what we have in front of us at that point is  
16 no longer a hearing within an adversarial system of  
17 justice, it adopts a whole new sort of  
18 characterization.

19 THE CHAIRMAN: But again, Mr. Campbell...

20 MR. CAMPBELL: And I understand that  
21 boards have all kind of rules to bring all sorts of  
22 things in front of them, but they cannot surely abandon  
23 the basic trappings of a hearing.

24 THE CHAIRMAN: No. I think you will  
25 appreciate that in the type of hearing that this Board,

1 the Environmental Assessment board and, by analogy, the  
2 joint boards conduct, particularly under this specific  
3 legislation the Environmental Assessment Act, that they  
4 have adopted often in the past the hearing format that  
5 pays attention in some considerable detail to the  
6 adversarial process but, at the same time, often  
7 includes an indication at various points in the case  
8 before it that they are uncomfortable - speaking of the  
9 Board - with the level or depth of some of the  
10 information being put before them and they have  
11 suggested strongly to various parties, including  
12 proponents, that certain areas should be addressed in a  
13 more substantive fashion.

14 In other words, they have indicated often  
15 whether it's evidence with regards to hydrogeology  
16 dealing with a landfill site, et cetera, that the Board  
17 is not necessarily content with the detail or the level  
18 of investigation conducted and, in some cases in fact,  
19 the Board has adjourned the proceedings in order to  
20 permit an opportunity for additional studies to be  
21 conducted to provide that extra detail that the Board  
22 feels is necessary before it can adjudicate.

23 Now, that is not to say, Mr. Campbell,  
24 that the Board could not adjudicate. The Board might  
25 well be in a position to adjudicate but, in doing so,

1 would likely find against the proponent's application.  
2 It would not be satisfied with the evidence being put  
3 before it and could say nothing, wait until the end of  
4 the case and then render the decision that that level  
5 of detail just did not satisfy the burden that the  
6 Board felt was necessary in accordance with the  
7 legislation.

8 It has adopted in the past a more  
9 flexible process, if I might put it that way, to say in  
10 areas where it feels more evidence is necessary, a  
11 situation where an opportunity for the presentation of  
12 that additional evidence can be provided without just  
13 waiting to the end of the case.

14 Now, I would suggest that that is a very  
15 substantive difference between the way courts would  
16 traditionally handle such a matter in the civil  
17 context. They might well say nothing and just wait to  
18 the end of a case and dismiss the application. The  
19 Board and, in particular, this Board has felt in the  
20 past that that doesn't necessarily serve the public  
21 interest in the long run.

22 MR. CAMPBELL: Well...

23 THE CHAIRMAN: So it's a mixture. What I  
24 am trying to say is: You are trying to characterize  
25 the proceedings as essentially adversarial and not

1       inquisitorial and perhaps those words are -- by  
2       definition, they conjure up particular images to  
3       various people.

4                       I would suggest to you that the practice  
5       of the Board is, in some instances, containing elements  
6       of both.

7                       MR. CAMPBELL: Well, Mr. Chairman, you  
8       have given me a lot to respond to.

9                       THE CHAIRMAN: I know, and I'm sorry for  
10      carrying on,, but before you go too far in your  
11      argument, I thought you might be--

12                      MR. CAMPBELL: Absolutely.

13                      THE CHAIRMAN: --you know, better  
14      prepared if you felt what the Board's perception of its  
15      own process to some extent is.

16                      MR. CAMPBELL: Sure. And, Mr. Chairman,  
17      I fully understand that process, I think all of the  
18      counsel in front of you today do, and I think they all  
19      welcome when they are calling their own cases that kind  
20      of indication. And, in fact, I have suggested that  
21      that is part of the mechanisms that are open to you and  
22      are appropriate. That happens all the time, and it's  
23      welcomed by counsel.

24                      I should point out as well, it also  
25      happens all the time in civil non-jury cases. We are

1 not any longer in the day where the trial judge sits  
2 there in stoney silence - we may often wish we were -  
3 but we are not, and so the kind of thing you are  
4 talking about, while it is indulged in with great  
5 irregularity perhaps by administrative tribunals, I  
6 dare say there are trial judges who, on non-jury cases,  
7 you would have some difficulty distinguishing the  
8 number of such suggestions or indications that come  
9 forward to counsel and they are considered as helpful  
10 in trial circumstances as they are in administrative  
11 hearing circumstances.

12               The point I am making though is simply  
13 that at some point, at some point you fundamentally  
14 change a process and, in my submission, that point is  
15 certainly reached when the Board directs a party as to  
16 what to include and not include in its case. In the  
17 end, when you take it right down to the bottom line,  
18 each party has the responsibility for putting in its  
19 own case.

20               That is entirely appropriate. If you  
21 look at the citations in support of these propositions,  
22 it is really - and you go back to the judgments, what  
23 you find is the courts are talking about the situation  
24 that only the party that sort of lives inside its own  
25 case that in the end is in a position to make the best



1 judgments about what is an appropriate statement of  
2 that case, how the client's interests are best served,  
3 all of those things.

4 In the end we may all like to second  
5 guess everybody else's case, but somebody has to take  
6 responsibility for that and it's that party. And as  
7 soon as the Board starts to order people to do  
8 something and include it as part of their case, then  
9 the Board is making those judgments.

10 THE CHAIRMAN: And just to follow on from  
11 that, if the Board clearly indicated that in its view  
12 what the proponent proposes to call is insufficient and  
13 left it at that.

14 MR. CAMPBELL: That's fine.

15 THE CHAIRMAN: That would be fine.

16 MR. CAMPBELL: That's fine.

17 THE CHAIRMAN: Because it is not ordering  
18 that party to call anything. It's indicating probably  
19 clearly that it's not satisfied with what it has and  
20 it's up to that party to decide overall whether it's  
21 going to take the chance.

22 MR. CAMPBELL: It's a clear message to  
23 the party that, if you can't convince me in argument  
24 that what you're saying is absolutely right, we want  
25 you to know the risk you're running and we think it's a

1       pretty high risk that you're facing.

2                       You can't indicate it in a way that as  
3       you reached a final conclusion on the matter, that  
4       would be inappropriate, the Board has got to maintain  
5       some openness of mind, but sure counsel look for that  
6       kind of indication all the time and, if it's very  
7       serious risk, they expect it to be stated quite firmly.  
8       It's not a very comfortable thing to hear, but it  
9       certainly isn't unusual.

10                      Now, the third issue which we raised is  
11       one that really goes to the question of whether, if the  
12       Board answers the first two questions the way we have  
13       suggested, are you left in a box. Do you not have  
14       anything left open to you that you can do. And some of  
15       what we have just been talking about and what's  
16       addressed in our third issue is the question of whether  
17       there are steps which, at an appropriate time, can  
18       properly be taken by the applicant or by the Board to  
19       ensure that the Board has adequate information on which  
20       to basis its decision in this matter. And we say the  
21       answer to that third question is yes.

22                      Now, I want to deal quickly with the  
23       first issue because I think probably it will turn out  
24       to be the least contentious and that is, the scope of  
25       the Board's ability to deal with pesticides issues.

1 "The Board under Section 12(2)..."

2 Which is reproduced behind Tab 1 of our  
3 book of authorities:

4 "...is required to hold a hearing with  
5 respect to whether approval to proceed  
6 with the undertaking should be given  
7 subject to terms and conditions and, if  
8 so, the provisions of such terms and  
9 conditions."

10 Some guidance as to what should be -- the  
11 kind of things that might be covered by terms and  
12 conditions is set out in Section 14(1)(b) of the  
13 legislation. I think it's important to point out that  
14 there is no limitation on the matters on which the  
15 Board can impose terms and conditions and 14(1)(b) sets  
16 out a list of items which illustrates the range of  
17 matters which can be considered with respect to terms  
18 and conditions.

19 I don't propose to go through them in any  
20 particular detail. I might mention particularly  
21 subsection (2) which speaks to works or actions to  
22 prevent, mitigate or remedy effects of the undertaking  
23 on the environment.

24 THE CHAIRMAN: Do you take the position,  
25 Mr. Campbell, that the Board has identical powers to

1 the Minister should the Minister be making the decision  
2 without a hearing, or that the Board has powers that  
3 are additional to the ones set out in Section 14, if it  
4 is making the decision pursuant to a hearing?

5 MR. CAMPBELL: The Board has powers to  
6 impose terms and conditions. I think 14(1)(b) can  
7 simply be read as illustrative of the kinds of terms  
8 and conditions that the Board might consider, but there  
9 is no sort of such list attached to 12(2).

10 It simply speaks to terms and conditions  
11 and I think the guidance that the Board can take is  
12 from 14(1)(b) but, more importantly, it has to take  
13 guidance from the purpose of the legislation that is  
14 set out in Section 2 of the legislation.

15 And provided a proposed term and  
16 condition can legitimately be said to being imposed to  
17 meet what the Board feels is necessary to achieve the  
18 purposes of the legislation, then I think the argument  
19 would be that you do have jurisdiction to impose such a  
20 term and condition.

21 And as I pointed out in paragraph 9 on  
22 page 4 of our statement, the authority to impose terms  
23 and conditions which supplement current regulations has  
24 been previously upheld in previous hearings held  
25 pursuant to the Environmental Assessment Act.

1                   Now, I have included in our material  
2           behind Tab 3 an excerpt from the transcript of the  
3           Joint Board hearing on the SNC Energy-From-Waste  
4           Proposal in Peel. I don't propose to take the Board  
5           through that in any detail, but after some argument on  
6           the issue, the Joint Board in that case, which was  
7           chaired by Mr. Cole, ruled at page 5579 starting at  
8           line 15 that:

9                   "In fact, the Board had a responsibility  
10          to consider appropriate matters when it  
11          was imposing terms and conditions under  
12          the Environmental Assessment Act and that  
13          if those conditions went beyond the  
14          current regulations, in this case  
15          prescribed by the Ministry of the  
16          Environment, then the Board had  
17          jurisdiction to make those sorts of terms  
18          and conditions if they felt it  
19          necessary."

20                  And we provide that simply as an example  
21          of how the Board has ruled previously in this matter  
22          and I think it makes sense; the regulations apply to a  
23          general situation and what is before the Board in most  
24          cases is a very specific proposal and it may be that in  
25          some aspect the Board feels that, given the purposes of



1 the environmental assessment legislation, something  
2 which supplements existing regulations would be  
3 appropriate.

4 I think the Board should exercise some  
5 caution and wisdom in doing that. But it is certainly,  
6 in terms of the jurisdictional issue, quite clear in  
7 our submission that it has jurisdiction to do that.

8 It is, therefore, our submission that the  
9 Board has the jurisdiction both to consider matters  
10 related to pest control products and to impose terms  
11 and conditions with respect to the use of such products  
12 for timber management purposes within the area of the  
13 undertaking.

14 Now --

15 MRS. KOVEN: Excuse me, Mr. Campbell. On  
16 your last point; would it be an example, in a case  
17 where a Board decided that it didn't have adequate  
18 information on the use of something like pesticides,  
19 would that be a sufficient reason for it to make in its  
20 decision a provision to supplement terms and  
21 conditions?

22 MR. CAMPBELL: Yes. I think there was a  
23 discussion earlier with Mr. Castrilli about sort of  
24 approval in part or in whole. The flip side of that  
25 coin is imposing terms and conditions which are aimed

1 at, in effect, the same result. I think you can come  
2 at that question two ways, a terms and conditions side  
3 or a partial approval side.

4 I suppose my bias would be a little more  
5 towards the terms and conditions side just because I  
6 think partial approvals get pretty awkward, but I  
7 consider them the flip side of the same coin, as I say.

8 MRS. KOVEN: So you would have the same  
9 outcome whether in fact the situation with the data, if  
10 we were looking at pesticides and eventually the final  
11 analysis was, there was unclear information about human  
12 health effects, you could arrive at the same decision  
13 given that sort of evidence as you could at the end of  
14 day if the Board thought it had insufficient or  
15 inadequate evidence?

16 MR. CAMPBELL: Well, I rather suspect you  
17 would end up with different terms or conditions because  
18 you might, in the second case where there had actually  
19 evidence been called and the matter had been gone into  
20 in some depth, you might end up with a different sort  
21 of term and condition that was responsive to the  
22 particular evidence.

23 If the Board had a concern, however, in  
24 your first instance, that the purpose of the Act could  
25 not be met without some additional evidence and in the

1       unlikely event that nothing else came forward, yes, you  
2       could -- I mean, I think you could fashion the term and  
3       condition which addressed that particular concern  
4       without sort of granting a partial approval.

5               THE CHAIRMAN:   How do you get around, Mr.  
6       Campbell -- I can't give you the citation, but there is  
7       a recent Federal Court of Appeal case that appears to  
8       hold the proposition that parties to an administrative  
9       hearing also have the right to argue and make  
10      submissions with respect to terms and conditions, as  
11      well as the body of the application before the Board in  
12      the first instance?

13             And what I am getting at here is:   If  
14      there wasn't adequate evidence and you imposed a term  
15      and condition that such activities could not take  
16      place, almost by way of condition precedent, unless  
17      certain evidence was produced to deal with a concern  
18      identified by the Board, where would parties have the  
19      opportunity to argue the sufficiency of say that  
20      evidence that was produced subsequent to the hearing?

21             MR. CAMPBELL:   Well, I think you have got  
22      to look at the timing of the different steps you are  
23      talking about.   If what you are talking about is what  
24      is in the Board's decision at the end of the day, the  
25      Board decides that based on everything in front of it

1 including the submissions.

2 And I don't think you are restricted in  
3 your imposition of terms and conditions as to those  
4 which have been suggested by parties in argument or  
5 during the course of the proceedings. Presumably, ones  
6 could come out at that stage that no one had ever heard  
7 of before or even considered before, but the Board felt  
8 was important.

9 THE CHAIRMAN: No, but I am suggesting  
10 that in cases where no evidence is forthcoming, and  
11 rather than prohibiting the use of what is being dealt  
12 with by the condition -- imposing a condition that it  
13 cannot be used until evidence is produced to ensure  
14 that an adverse effect is not in fact the case, where  
15 does somebody get the opportunity to argue the adequacy  
16 of that further evidence if it is not dealt with in the  
17 evidence hearing itself?

18 MR. CAMPBELL: Well, presumably all  
19 parties have had that opportunity before you get to the  
20 point where the Board reserves then goes away and makes  
21 its decision. I am not quite sure I understand fully  
22 what you are getting at, but certainly all parties have  
23 the opportunity to make submissions on that matter and  
24 suggest how the Board ought to go away and deal with  
25 it.

1                   The problem with the kind of term and  
2                   condition that you posit, if it doesn't come up until  
3                   the Board issues its decision, is sort of: To who does  
4                   this evidence go, how is it -- presumably the term and  
5                   condition would have to go on and impose some sort of  
6                   process for resolution of this issue.

7                   And I suggest to you that that starts to  
8                   get very, very messy and a difficult thing to do even  
9                   if the Board had jurisdiction to sort of extend its  
10                  life in that sense, and I am not sure that it does.  
11                  The joint board might be a little different.

12                  THE CHAIRMAN: It might under the Joint  
13                  Board under Section 5 to defer it to itself later on--

14                  MR. CAMPBELL: That's right.

15                  THE CHAIRMAN: --any matter before it.  
16                  And that's what I thought you were getting at in terms  
17                  of your last point. And what I meant to bring up was  
18                  the fact that under the EA Act there is no such  
19                  deferral provision.

20                  MR. CAMPBELL: No, and the Board will  
21                  have to make a decision under those circumstances  
22                  knowing that it has got to make up its mind based on  
23                  what's in front of it. If it considers it to be  
24                  inadequate, the Board is going to have to make up its  
25                  mind as to what the consequences of that inadequacy



1       are. But I rather suspect that boards are in that  
2       position all the time.

3                   And all I was suggesting was that there  
4       are two ways to cut it. You can look at it from a  
5       partial approval side or you can achieve the same  
6       result through a term and condition.

7                   THE CHAIRMAN: Okay.

8                   MR. CAMPBELL: Now, Mr. Chairman, the  
9       second issue which I raised which, in my submission, is  
10      really the narrow issue which is before you today is  
11      the question of whether the procedure proposed by the  
12      applicant in its relief requested is appropriate.

13                   Now, my friend Mr. Castrilli points out  
14      quite correctly that Section 5(3) of the Act requires  
15      that an environmental assessment consist of certain  
16      matters. They are required to be addressed.

17                   I would point out to you, though, that  
18      Section 5(3)(c), which he particularly relies on,  
19      requires:

20                   "a description of environmental effects  
21                   that might reasonably be expected, the  
22                   effects that will be caused or might  
23                   reasonably be expected to be caused, the  
24                   actions necessary or that may reasonably  
25                   be expected to be necessary to prevent,

1 change or mitigate the effects."

2 All three subsections have implicit in  
3 them -- or explicitly stated in them a sense that there  
4 is some reasonable limit which a proponent -- beyond  
5 which a proponent does not have to go. And it is also  
6 important to note that the statute does not set out any  
7 standard for the level of detail at which the  
8 assessment must be prepared.

9 And in response to this same conundrum  
10 which arises in every case: How far does the proponent  
11 need to go in doing its analysis, previous hearing  
12 panels have picked up on that concept of reasonableness  
13 that is explicitly built in to the statute and have  
14 said: We are going to use that test of reasonableness  
15 to determine what constitutes both an appropriate range  
16 of alternatives and the level of detail at which  
17 alternatives have to be examined.

18 And obviously a test which examines on  
19 the basis of reasonableness doesn't set a specific  
20 standard for inquiry, but states, to use the words of  
21 the decision in the Ontario Hydro Plan Stage decision  
22 in Eastern Ontario, it states that:

23 "The level of detail of the analysis may  
24 vary according to the information  
25 obtained or the nature of the alternative

1                   and what is reasonable under the  
2                   circumstances."

3                   And I have included the reference to the  
4           Eastern Ontario Plan Stage decision and the excerpts  
5           can be found in our book of authorities.

6                   Now, that test recognizes that when a  
7           proponent goes out to do an environmental assessment  
8           one of the tough things they have got to do is make a  
9           judgment as to the appropriate level of detail at which  
10          to examine any particular alternative. The Act doesn't  
11          say you must examine every alternative to a specified  
12          level of detail and across a specified scope.

13                  The proponent necessarily -- he can't  
14          avoid making that judgment, he must make a judgment in  
15          the first instance as to how far and what level of  
16          detail the analysis must proceed.

17                  The important thing about that is not the  
18          fact that they have to make a judgment, which I think  
19          only makes sense when you look at the legislation, the  
20          important thing is that that judgment is not fixed and  
21          binding on everyone else. That judgment is open to  
22          challenge by everybody else.

23                  And in the situation that we are in where  
24          we have a hearing, it is open to challenge by certainly  
25          any party in this hearing. That challenge may result

1 in the proponent, in this case MNR, explaining more  
2 fully the examination of any alternative or conclusion  
3 reached; it may result in the proponent calling more  
4 evidence on the matter, it may result in a number of  
5 actions that I will be coming to a little later in my  
6 argument, but it is that process of making a judgment  
7 at the beginning and then the opportunity for that  
8 judgment to be challenged which is the essence of the  
9 play of issues in front of this Board. And in the end,  
10 of course, the Board reaches its conclusion based on  
11 all of the evidence before it.

12 Now, that proposition is again set out in  
13 the Eastern Ontario Plan Stage decision, and I might  
14 just pause for a moment to ask the Board to go to Tab 4  
15 of our book of authorities and behind Tab 4, the page  
16 which is numbered 23, being page 23 of the Reasons for  
17 Decision.

18 And at the bottom of page 23 the  
19 photocopier cut off the last line and I want to go  
20 through the mundane exercise of asking you to write in  
21 the words that are missing and the words are -- and the  
22 sentence reads along:

23 "It is all of that evidence and not the  
24 positions of the parties that leads to  
25 the decision to be made."

1                   So the words that are missing are  
2     "...parties that leads to the decision to be made."

3                   Now, before continuing down our line of  
4     argument on this matter, I would like to address just  
5     for a moment what Mr. Castrilli pointed out were three  
6     sort of important features when it came to pesticides  
7     matters.

8                   First, that there was no EA, no  
9     requirement for a full environmental assessment;  
10    second, for registration there was acceptance, in some  
11    unusual circumstances no requirement for hearings; and,  
12    third, that there was no evaluation and review of  
13    alternatives as is required in the Environmental  
14    Assessment Act.

15                  I don't want to argue about any of those  
16    particular issues, but I say this: To say that and to  
17    note those things, in my submission, says nothing about  
18    the issue which is before you today. The issue that's  
19    before you today is the procedure which is requested by  
20    the applicant to be included in the Board -- in an  
21    order from the Board appropriate. And, in my  
22    submission, those three factors that Mr. Castrilli has  
23    mentioned are completely irrelevant to that  
24    consideration.

25                  They may affect -- he may want to make an



1 an argument down the road that they affect the weight  
2 to be given to the judgment exercised by MNR in this  
3 matter, but they do not go to the issue that is before  
4 you today.

5 What is the issue that's before you  
6 today? In this case, MNR has made a judgment based on  
7 therer being federal registration and provincial  
8 classification schemes in place that it is reasonable -  
9 using the words of the legislation:

10 "It is reasonable for MNR to conclude  
11 that the use of registered products in an  
12 approved manner will not result in  
13 significant human health effects."

14 That's the judgment they have made. And  
15 indeed, if it is correct - and I say if because we  
16 don't know based on what's before the Board at the  
17 moment if it is correct - that in fact no human health  
18 effects would result at all, ever, then Section 5(3)  
19 gives no obligation -- puts no obligation on MNR to  
20 assess such effects, such non-existent effects either  
21 in the Environmental Assessment Document or in  
22 evidence.

23 And the problem that is before you today  
24 arises from the fact that the applicant in bringing  
25 this motion is indicating that it disagrees with the

1       proponent's judgment and that further evidence should  
2       be before the Board. So what you have in front of you  
3       is a dispute and, in my submission, what the applicant  
4       is suggesting as a process for resolving this dispute -  
5       which for reasons that we have talked about before in  
6       part - it is just an inappropriate process.

7               There are a number of propositions that  
8       lead me to that conclusion. First, I think it is  
9       fairly trite to say that the jurisdiction of the Board  
10      must be found in its governing legislation, that's  
11      where it's defined. You can't define the scope of what  
12      you are to be looking at or the way you are to be  
13      looking at it in that legislation, you can't make it  
14      up, it has got to be there. And that legislation,  
15      being the Environmental Assessment Act, provides no  
16      authority to the Board to compel any party to address  
17      any substantive manner in its testimony or evidence.

18             There are no words in the legislation  
19      which could be fairly read as giving the Board that  
20      jurisdiction and, further, there is no circumstance  
21      raised in the applicant's material which would support  
22      any conclusion that the order requested was necessary  
23      for the Board to carry out its function. The Board can  
24      get at this issue in a number of ways, as we will come  
25      to, and it has a number of remedies at the end of the

1 day no matter what the state of the evidence is before  
2 it, it can deal with this issue.

3 It is our further submission that it is  
4 not within the Board's authority to adapt practices,  
5 procedures or rules which would fundamentally affect  
6 the responsibility assigned to the parties and to the  
7 Board under this adversarial system of justice in which  
8 the Board operates.

9 Now, Mr. Chairman, in light of our early  
10 discussion what I propose doing, and I succinctly  
11 repeat what I said before, that there is a line there  
12 over which it will be quite inappropriate to cross and,  
13 in our submission, that's what the applicant is asking  
14 you to do.

15 THE CHAIRMAN: Okay. Let's just stop  
16 there for a moment. In connection with your statement  
17 that there is no authority in the legislation for the  
18 Board to compel any parties to call certain evidence,  
19 and your earlier statement that Mr. Castrilli when  
20 comparing how pesticides were regulated by other  
21 authorities, such as they didn't go through an EA  
22 process, no hearing exception -- exception at hearings  
23 and no alternatives, that there that not before us in  
24 terms of this particular application, this motion; are  
25 you taking the position that the Board as a result of

1       this application and as a result of the discussions by  
2       all of the parties - we haven't heard them all of  
3       course at this point - but in terms of the written  
4       submissions anyway of all parties before us, that the  
5       Board cannot do anything at this stage other than deny  
6       the relief sought by Mr. Castrilli?

7                Could the Board at this stage, in your  
8       view, make any findings with respect to the question of  
9       whether in its view it felt that the Ministry did or  
10      did not comply with Section 5(3) on a question of  
11      reasonableness?

12               MR. CAMPBELL: No, I don't believe the  
13      Board at this point should be making any findings  
14      whatsoever on that matter. It would be quite  
15      inappropriate, it is far too early. You haven't even  
16      had the evidence of these two panels to determine, in a  
17      direct way, what the nature of the discussion is, how  
18      they go about alternative methods of achieving the same  
19      objectives, how they make those decisions, et cetera.  
20      You are a long way from the point where you will be in  
21      a position do that, if indeed it can ever be argued  
22      that you are in a position at any time before the end  
23      of the hearing.

24               I would like to come back to what we  
25      talked about before. It is useful and beneficiary to

1       counsel and useful to the Board to indicate where it  
2       feels the evidence might be falling short, just as from  
3       time to time you indicate: I don't think we need to  
4       hear any more about this from Mr. so and so. The same  
5       kind of reasoning applies.

6                   THE CHAIRMAN: Would that be appropriate,  
7       in your view, at this stage in connection with the  
8       disposition of that motion?

9                   MR. CAMPBELL: Taking into account what  
10      you have just said, it would be premature for the Board  
11      to make findings. In my sense it would be premature  
12      for that reason, that what you will be doing is  
13      responding to sort of an unfocused apprehension about  
14      pesticides without any evidence in front of you at all.

15                  THE CHAIRMAN: We will be responding to  
16      supposedly the position by the proponent that they  
17      don't intend to call any further evidence beyond  
18      indicating and putting before the Board details  
19      concerning the registration and/or consideration by  
20      other regulatory authorities.

21                  MR. CAMPBELL: I guess -- I think clearly  
22      you should get that evidence in front of you. The  
23      problem is that with respect to all of this matter,  
24      there is at the moment no evidence in front of you.  
25      There is no affidavit filed on this motion, there are



1 witness statements which are not yet introduced into  
2 evidence and there are interrogatory answers which are  
3 not yet introduced into evidence.

4 So any understanding of what's properly  
5 before you on which to make any kind of ruling or make  
6 any kind of assesement of the evidence, I think it is  
7 very difficult to look at it now and provide useful  
8 guidance.

9 THE CHAIRMAN: Well, perhaps --

10 MR. CAMPBELL: I have been in that kind  
11 of judgment before.

12 THE CHAIRMAN: Ferhaps the answer to this  
13 question would be better answered when we hear the  
14 Ministry's position in response to this motion as to  
15 what they intend to call.

16 MR. CAMPBELL: Absolutely, and I can't  
17 answer that question for them.

18 THE CHAIRMAN: Right. We are going at  
19 this stage by what Mr. Castrilli thinks their position  
20 is and what you think their position is and what  
21 statements they have made in terms of the material that  
22 they filed with respect to this motion.

23 MR. CAMPBELL: That's right. And I guess  
24 my concern in this whole motion, and the concern of my  
25 client, is that this matter not fall over to the area

1 of dealing with the merits or otherwise of pesticide  
2 use.

3 That's not what's involved in this  
4 application. It is purely, in our submission, a sort  
5 of procedural question and the merits or otherwise of  
6 pesticides really can't fairly be permitted to  
7 influence your decision on this motion.

8 Now, as I said before, yes, there are  
9 restrictions on what the Board can do and does the  
10 Board have -- should the Board, rather, have a concern  
11 that denial of the remedy --

12 THE CHAIRMAN: Excuse us a second.

13 ---Discussion off the record

14 THE CHAIRMAN: Sorry, Mr. Campbell.

15 MR. CAMPBELL: I guess the difficulty  
16 would be if we were arguing here today with the results  
17 of a position that we are taking, that it would be --  
18 or what we urge upon you would foreclose any relevant  
19 review of the pesticides issue in these proceedings.  
20 In our submission, that's just not the result of what  
21 we are asking.

22 What we are saying is there is a right  
23 way to get the material in front of the Board or to  
24 attempt to do so and there is a wrong way and, in our  
25 submission, what Mr. Castrilli is asking for is the

1 wrong way.

2 Now, we do say that there are a variety  
3 of courses of action available to the applicant, to MNR  
4 and to the Board so as to ensure that the Board has  
5 adequate evidence in front of it on relevant issues,  
6 and we submit that while the Board should encourage all  
7 parties to call appropriate evidence on all relevant  
8 issues, the Board cannot compel a party to call  
9 witnesses which that party does not consent to call  
10 and, therefore, the Board should not grant the relief  
11 requested in paragraphs A and B of Mr. Castrilli's  
12 Notice of Motion.

13 Now, that obviously leads me to my third  
14 issue, which I suppose is characterized to point to  
15 some directions that could be pursued with this issue.  
16 And it is our submission that there are existing  
17 practices and procedures which could be followed in the  
18 circumstances that Mr. Castrilli has raised and  
19 certainly there are established practices and  
20 procedures which have been followed in the  
21 circumstances raised on this application.

22 And, again, I would refer to the  
23 discussion in the Eastern Ontario Plan Stage decision,  
24 again behind Tab 4. I don't think it is necessary to  
25 turn it up, but there the Board held that:

1 "Where an intervenor disagrees with a  
2 conclusion or judgment of the proponent,  
3 the intervenor is called upon to put  
4 forward in evidence sufficient  
5 information to conclude that the  
6 proponent should have been given further  
7 consideration to the matter..."

8 In this case to the human health effects  
9 of pesticides. He says: The role of the intervenor is  
10 to rebut. If the proponent doesn't call any evidence,  
11 then Forests for Tomorrow has nothing to rebut.

12 Now, this position for Mr. Castrilli I  
13 don't think can be maintained. On the one hand he's  
14 asking you to expand your powers beyond what we submit  
15 is in your jurisdiction and, on the other hand, he's  
16 saying we want -- we are suggesting to you that the  
17 intervenors opportunities in this hearing are very  
18 restricted, we can only rebut.

19 Well, in my submission, Mr. Chairman,  
20 members of the panel, that is just plain wrong. It  
21 ignores the fact that the intervenor has, in this  
22 hearing as in every environmental assessment hearing,  
23 and for the very reason that hearings are held, he has  
24 the opportunity to add to the evidence, to supplement  
25 the evidence, or to bring into the case entirely new

1 issues, concerns or alternatives.

2 To describe an intervenor's role as  
3 simply being to rebut makes, in my submission, a  
4 mockery out of the hearing process although it is  
5 something that I think, if upheld, would come back to  
6 cut at intervenors very, very hard. Intervenors, in my  
7 experience in these hearings, one of the fundamental  
8 things they do is they make you think whether there are  
9 any other alternatives out there that you should have  
10 looked at and if they are, they bring them into the  
11 hearing and they demand that they be evaluated. And  
12 certainly my experience has been, where I am acting for  
13 proponents, that that is one of the best ways to test  
14 whether a project is really making sense.

15 We've adjusted, the Board has adjusted,  
16 proponents have adjusted, everybody has been forced to  
17 re-think carefully what they are doing because somebody  
18 out there, may be not in a very sophisticated way, but  
19 they take advantage of that hearing process and they  
20 come in and say: Here's another way you should be  
21 doing this, look at it this way. That isn't a  
22 rebuttal, that is adding constructively to the hearing  
23 process and any proposition which short circuits that  
24 ability, in my submission, is simply not sustainable  
25 and it would negate a huge proportion of what's



1       valuable in a hearing.

2                   And my friend Mr. Castrilli characterized  
3       my view on this matter as involving a shifting of onus.  
4       That is exactly not what is contemplated in this test  
5       of reasonableness that the Board set out in the Ontario  
6       Hydro Plan Stage Reasons for Decision. And I would  
7       like to turn you to Tab 4, in fact they say the exact  
8       opposite, I will take you right to that point.

9                   There, behind Tab 4 at page 23 on the  
10      bottom paragraph, they are looking at this rebuttable  
11      presumption, which was the language used in this that  
12      case, this rebuttable presumption that operates in the  
13      proponent's favour when it makes its judgment about  
14      reasonableness. And the Board stated quite clearly at  
15      the bottom of page 23:

16                   "We do not see that as a shifting of onus  
17                   from the proponent to other parties as  
18                   was suggested by counsel for the Hydro  
19                   Consumers Association."

20                   Counsel in that case was raising the  
21      precise objection that my friend spoke of for the  
22      Board's consideration that somehow there was some major  
23      shifting of onus and the Board said no.

24                   It is not a shifting of onus that would  
25      require in this case the intervenor to prove -- to

1       actually prove that adverse human health effects would  
2       in fact occur. What the Board goes on and says in that  
3       paragraph is that the intervenor does have some  
4       responsibilities and those responsibilities are to set  
5       out a, "minimum level of substantiation", and that that  
6       minimum level was what was required in order to  
7       conclude that further consideration is required.

8               So I want to -- this really has -- I make  
9       this submission to support two propositions. First of  
10      all, that when Mr. Castrilli suggests there is a  
11      shifting of onus, the Board decision that we rely on  
12      clearly sets out that that is not what they  
13      contemplate; and, secondly, that we are not setting up  
14      some kind of a test here that is impossible to meet.

15             We are not saying: Mr. Castrilli, we  
16      think you ought to do it the right way and then pulling  
17      the rabbit out of the hat and saying: But the right  
18      way is going to be impossible for you to meet. That's  
19      not what we are doing. We are simply saying that there  
20      is some minimum level of substantiation, some  
21      requirement to address the rationale for why you think  
22      that the MNR's judgment is incorrect.

23             It's not enough to just stand up and say  
24      it's incorrect, therefore, find in my favour. There is  
25      a minimum level of substantiation that's required. And

1       once that's undertaken, assuming that minimum level of  
2       substantiation is met, it seems to me that several  
3       choices are then available both to MNR, the Board and  
4       to other interested parties and I have listed some.

5               They include: For MNR, they could take a  
6       look at this evidence and say: Gosh, we better address  
7       this matter in a little more detail, the calling of it  
8       and so they could call additional evidence in reply on  
9       the matter of health concerns relating to pesticide use  
10      or, they could simply say: Based on what we have  
11      heard, we think the proposition is still sustainable  
12      and we are going to argue it and we are going to take  
13      the risks of taking that position in argument. Both of  
14      those courses of action are quite appropriate.

15             And for my friend to say that somehow  
16      there's an unfairness in reply, to me just misses the  
17      point. Does that mean that in his case he can't raise  
18      anything new because it gives rise to an unfair right  
19      of reply. That would be the consequence of what he's  
20      saying. It would just completely -- it operates --  
21      that proposition operates completely apart from the  
22      normal understanding of how a case unfolds. An  
23      intervenor has every right to raise new things or to  
24      give things new evidence -- or new emphasis and a  
25      proponent has every right to reply to them. And those

1 rules are just as much for the protection of my friend  
2 as they are for the protection of MNR.

3 Now, for the Board, as we have discussed,  
4 the Board could advise the proponent in open hearing  
5 that it is uneasy as to the state of the evidence  
6 before it on the matter and it wants the proponent to  
7 know that. Now, it could state that more strongly or  
8 less strongly, I happen to use those words. But Boards  
9 do that all the time and courts do that all the time.  
10 If the matter has been touched on in evidence and the  
11 Board feels it needs expert assistance to understand it  
12 in a more comprehensive way, it has authority to call  
13 experts under those circumstances.

14 Other interested parties can call  
15 evidence on the matter or move to be permitted to call  
16 evidence in reply if principles of fairness so dictate.  
17 I mean, we are not at the end of the road yet. If the  
18 way the evidence going in happens in a way that leads  
19 to some procedural unfairness, the Board has the  
20 authority to remedy that.

21 Sure it sometimes gets a little messy, a  
22 little awkward, but it can be sorted out. You have all  
23 the powers you need to sort out any kind of unfairness.

24 And I would like to give you an example  
25 of where just this kind of circumstance happened in

1 relation to a safety issue that's federally regulated  
2 in a hearing before a Joint Board, the main  
3 consideration there being Environmental Assessment Act.

4 And that hearing was the Ontario Hydro  
5 application for the approval of transmission facilities  
6 in southwestern Ontario that led to an approval and  
7 those facilities are now under construction. I have  
8 cited the decision and the relevant pages which discuss  
9 this issue are set out behind Tab 8 in our statement.

10 But what happened in that case, as you  
11 can sort of glean by reading through all of that, what  
12 happened in that case was that Ontario Hydro called its  
13 evidence as to the location of a proposed transmission  
14 line in relation to the Goderich airport. Part of that  
15 evidence consisted of correspondence from the federal  
16 regulatory authorities responsible for aviation safety  
17 which said: The line is safe if located as shown on  
18 the sketches which you forwarded to us. Stop. As far  
19 as Ontario Hydro is concerned that settled the matter  
20 of safety of that line.

21 Well, the Goderich airport people sort of  
22 took exception to that, they weren't very happy about  
23 the view that the federal regulatory authorities had  
24 suggested and, in fact, what they did is they talked to  
25 them again, led some evidence on their own which



1 indicated that there had in fact been some -- there  
2 would in fact be some requirements placed on Ontario  
3 Hydro to light and paint those facilities if indeed it  
4 went ahead in that location. They had addressed the  
5 issue of safety, but they had neglected to go on and  
6 say that by the way we're going to make you spend a lot  
7 of money to put lights on these towers and paint them  
8 if they stay there, even though that we are telling you  
9 they're safe.

10 So that with that additional bit of  
11 information, Ontario Hydro went back re-evaluated that  
12 alternative, re-evaluated another alternative, that's  
13 sort of first round. The local residents had also  
14 appeared and made submissions as to the factors which  
15 they felt should influence the choice of the various  
16 alternatives in that area, but at that point when  
17 Goderich airport led its testimony, Ontario Hydro  
18 decided it better go back and look at this again.

19 It went back, re-evaluated the whole  
20 thing, came to a different conclusion. The hearing  
21 went back to Goderich, Hydro led its testimony as to  
22 its changed conclusion and why, the people who had  
23 already made their submissions on the alternatives were  
24 given the opportunity to supplement their original  
25 submissions, and the matter unfolded just in the normal

1 course of events the way you would expect to happen in  
2 any hearing where issues of that type had to be dealt  
3 with.

4 It was very straightforward, no major  
5 problem. Yes, we had to go back and some appearances  
6 had to be permitted for fairness reasons. Eventually  
7 the matter happened to be settled, but procedurally it  
8 was a perfectly sensible and straightforward way of  
9 doing it, it doesn't offend the basic principles of the  
10 hearing. But at no time did the Board lean over and  
11 say: Ontario Hydro, we want more evidence on this and  
12 you better call it or we require you to call it. The  
13 parties put evidence before the Board which caused a  
14 certain re-thinking of the proposal, certain amendments  
15 were made and then sufficient evidence was put in front  
16 of the Board to allow it to rule on the final proposal  
17 before it.

18 So that there is lots of examples. I  
19 could give you more examples, but certainly there is  
20 one that I think is particularly pertinent because it  
21 involved a federal regulatory authority involved safety  
22 issues and it was dealt with in just the way we are  
23 suggesting this issue of pesticides could be dealt  
24 with.

25 So I guess in summary what I would say is

1       that existing procedures do provide a variety of  
2       mechanisms to ensure that relevant issues are  
3       appropriately explored in evidence. There is no  
4       serious impediment preventing the applicant from taking  
5       advantages of those mechanisms and, as is pointed out  
6       in paragraph 24 of our statement, in taking this  
7       position, MOE advises all parties that it is willing to  
8       make MOE expertise available to parties in relation to  
9       pesticides issues and to use MOE's good offices to  
10      assist parties seeking access to federal expertise in  
11      this area.

12               I think this is quite consistent with the  
13      position we have taken at the beginning of this hearing  
14      and that's an offer that we open to all parties.

15               So that for all of the foregoing reasons,  
16      we ask that the Board deny the relief requested in  
17      paragraphs A and B of the Applicant's Notice of Motion,  
18      but we would add, to deny it without prejudice to any  
19      party pursuing issues related to the human health  
20      effects of the use of pesticides during the course of  
21      the Board's proceedings.

22               Again, I come back to our bottom line  
23      which is: We are not trying to suggest that pesticides  
24      can't be dealt with in the hearing, but what this  
25      motion is about today is: Is there a right and wrong

1 way to do that. We say there is and we say that the  
2 applicant is proposing a way that is the wrong way.

3 Finally, with respect to paragraph C of  
4 the relief requested by Mr. Castrilli, we are not  
5 opposed to the granting of that relief, but we would  
6 note that the position set out in the paragraphs  
7 referred to in that relief paragraph C could be argued  
8 by any party whether set forth in evidence or not.  
9 They are really there to say: Here's our position on  
10 this matter. They didn't need to say it, my submission  
11 anyway, they could have remained quiet about that and  
12 just said: Here's the evidence. I think they went an  
13 extra step. They said: We want everybody to  
14 understand what our position is and here it is. But  
15 it's open to them to argue it -- open to MNR to argue  
16 it at the end of the case in any event. And to our way  
17 of looking at it, it makes no material difference  
18 whether those paragraphs are in or out. I don't think  
19 it would be make one wit of difference to argument at  
20 the end of the day.

21 Now, subject to - if I could just have a  
22 moment so that Ms. Seaborn can advise me if I have  
23 completely missed any critical point - and subject to  
24 any questions that the Board may have, those are my  
25 submissions.

1                   Subject to questions, those are my  
2                   submissions, Mr. Chairman.

3                   THE CHAIRMAN: And, Mr. Campbell, just  
4                   one before we break for the lunch hour. What, in your  
5                   view, is the purpose of the exchange of witness  
6                   statements and, I guess by extension, the interrogatory  
7                   process in terms of affording all the parties,  
8                   including the party that submits the statement in the  
9                   first place, poses the interrogatory or parties  
10                  receiving the witness statements or receiving the  
11                  answers to the interrogatories, in identifying areas in  
12                  the evidence that are going to occur in the future and  
13                  attempting to put forward and address those concerns  
14                  without waiting for that evidence to be actually put  
15                  in?

16                  And perhaps that's a difficult question  
17                  to understand, but the point is, is that under the  
18                  Board's rules, the witness statements are to contain  
19                  concise summaries of the evidence upon which a party  
20                  intends to rely. Having put in those witness  
21                  statements, distributed them to the other parties, all  
22                  of the other parties are in effect relying upon those  
23                  witness statements and the statements made therein as  
24                  to the evidence that the party submitting it is going  
25                  to in fact call.



1 MR. CAMPBELL: Yes.

2 THE CHAIRMAN: Where those witness  
3 statements indicate that certain evidence is not going  
4 to be called and it is an issue of concern to one of  
5 the parties responding, either in support of the  
6 proponent's overall application or in opposition  
7 thereto - aside from Mr. Castrilli's arguments for the  
8 moment on whether the Board should be compelling a  
9 party to call specific evidence - is it, in your view,  
10 premature in any way for the Board to indicate its  
11 concerns based on those same witness statements?

12 Does it have to wait until all of that  
13 evidence is in to see whether in fact those concerns  
14 have been adequately addressed? Because to do so may  
15 be to raise the objection on the part of other parties  
16 that we didn't realize that that evidence was going to  
17 be addressed, it's not in the witness statement and the  
18 party is relying on evidence that is not in fact set  
19 out in the witness statement as it should have been in  
20 accordance with the Board's rules.

21 It's a chicken and egg argument, but I  
22 pose the question in response to your submission that  
23 the Board should not consider the substantive nature of  
24 Mr. Castrilli's comments, apart from the procedural  
25 aspects of whether or not there should be an order

1       compelling the calling of certain evidence or not.

2                   I guess what I'm saying, Mr. Campbell, is  
3       that we have in this process, at least at this stage of  
4       the process a discovery procedure, if you might call it  
5       that, in the form of witness statements and  
6       interrogatories and the purpose of that procedure is to  
7       advise all of the parties of what to expect and what  
8       they can rely on in terms of what evidence will be  
9       called.

10                   MR. CAMPBELL:  Mr. Chairman, I think I  
11       understand the question and if we are about to break  
12       for lunch, could I think about it over lunch?

13                   THE CHAIRMAN:  Very well.

14                   MR. CAMPBELL:  Thank you.

15                   THE CHAIRMAN:  And if you remember the  
16       question over lunch, my compliments to you.

17                   We will break until I think 2:30.  We  
18       have had a rather long session this morning.

19                   Thank you.

20       ---Luncheon recess taken at 1:00 p.m.

21       ---On resuming at 2:40 p.m.

22                   THE CHAIRMAN:  Thank you.  Be seated,  
23       please.

24                   Mr. Campbell?

25                   MR. CAMPBELL:  Thank you, Mr. Chairman.

1       You left me with a question and the nice thing about  
2       having lunch to think about it is that you get to  
3       restate the question too, never mind thinking about the  
4       answer.

5                       So at risk of completely redefining the  
6       question. As I understand it, the Board has a concern  
7       as to when in the process -- how early in the process,  
8       for instance, would it be appropriate, even now, to  
9       indicate that it wished or to express a view that it  
10      was uneasy as to the state of the evidence on any  
11      particular matter including just the written testimony.

12                     THE CHAIRMAN: But not out of the blue,  
13      based on prefiled witness statements--

14                     MR. CAMPBELL: Witness statements.

15                     THE CHAIRMAN: --and to the extent that  
16      the Board is aware of them, interrogatories.

17                     MR. CAMPBELL: Normally at that stage you  
18      wouldn't have the interrogatories on the specific issue  
19      or panel in front of you. But I think my answer quite  
20      simply is this that, I think the Board should be  
21      cautious not to jump to too quick a conclusion on these  
22      matters. So I instinctively would advise you that the  
23      end of the proponent's evidence is probably the most  
24      appropriate time, with the important caveat that you  
25      have adopted a scoping procedure, and that one of the

1 matters that the Board has asked to be addressed in its  
2 scoping procedure prior to the panel going in in-chief,  
3 is: What areas do parties indicate they would like to  
4 see addressed in direct examination and --

5 MR. MARTEL: Could I just halt you there  
6 for a moment, Mr. Campbell, because we have seen those  
7 scoping statements as well. I just add to what the  
8 Chairman said, we have already seen those statements  
9 from all the intervenors at this particular time as  
10 well. Okay. I will just throw that in.

11 MR. CAMPBELL: And I think that all of  
12 that material provides a base where the Board could  
13 fairly provide an answer to that same question it is  
14 asking of the parties: What do you want to hear about  
15 in direct examination. And I think certainly that it  
16 would not be inappropriate for you to give some  
17 indication of a matter that you would like to have  
18 addressed, having read the witness statement, you're a  
19 little concerned about this particular item, or you  
20 didn't quite understand it, or whatever the rationale  
21 is for wanting to hear about it, but you would like to  
22 hear about it.

23 But, as I say, I guess by inclination I  
24 would just advise the Board that I think you ought to  
25 be a little cautious about coming to a conclusion and

1       conveying that conclusion too quickly. That's not so  
2       much a procedural point, just being -- it 's just I  
3       would like you to have a little more evidence in front  
4       of you than a little less when raising that kind of  
5       concern.

6                   THE CHAIRMAN: And you state that that's  
7       your position in cases where it's not necessarily a  
8       matter of having a little evidence before the Board,  
9       but having an indication that there will be no further  
10      evidence before the Board?

11                   MR. CAMPBELL: Yes, I think so, and  
12      there --

13                   THE CHAIRMAN: You see, there is a  
14      distinction, Mr. Campbell, where a witness statement  
15      indicates that there is going to be evidence and  
16      attempts to concisely describe what that evidence will  
17      be; and, in looking at the witness statement, the Board  
18      or other parties aren't sure that it addresses  
19      everything and to the level that they would like it  
20      addressed, but there is a clear indication there is  
21      going to be evidence.

22                   Would your views change in a situation  
23      like that as opposed to where there is a clear  
24      indication there will be no evidence?

25                   MR. CAMPBELL: I don't think in any



1 material way, but I think the question you might put  
2 forward as a panel might be slightly different in  
3 that -- and I mean, we might as well deal with the  
4 example that's right in front of us.

5 The proponent has made a judgment, MNR  
6 has made a judgment as to how far it thinks it needs to  
7 go and it would not be inappropriate for you to ask  
8 what is your rationale for arriving at that conclusion.

9 THE CHAIRMAN: And purportedly in this  
10 example it's given a rationale for that?

11 MR. CAMPBELL: Yes. And if you have got  
12 a question mark in your mind about that, then sure,  
13 that's the kind of thing where you could indicate that  
14 the proponent might wish to address this matter  
15 in-chief.

16 Now, the problem I have with this is that  
17 there is a real choice open to the proponent. They  
18 have to make choices as to what they put in front of  
19 the Board in their chief and they may not think, in  
20 their judgment, that this is the most important matter  
21 they have to deal with it.

22 I think they are entitled to do that and  
23 the Board is entitled to ask questions and do all of  
24 the other things that panels do in this hearing. But I  
25 don't think the principles really change fundamentally

1       depending on how you formulate the question.

2                   THE CHAIRMAN:   Okay.   Thank you.

3                   MR. CAMPBELL:   Thank you, Mr. Chairman.

4                   Ms. Cronk?

5                   MS. CRONK:   Thank you.   Mr. Chairman, I  
6       hope to be very brief.   In light of some of the  
7       submissions that you have received from Mr. Campbell,  
8       it won't be as necessary for me, as we once perceived  
9       it was, to dwell at some length on some of the  
10      submissions we wish to make.   So with that promise  
11      really, as distinct from an undertaking, I will  
12      proceed.

13                   There are really three issues upon which  
14      we wish to address you.   The first has been much  
15      discussed this morning and that is the suggestion that  
16      the Board has jurisdiction to compel particular  
17      evidence through a party to these proceedings, and I  
18      place some emphasis on the latter phrase, through a  
19      party to the proceedings.

20                   The second issue is whether withdrawal of  
21      part of the MNR witness statements for Panels 12 and 13  
22      should be ordered by the Board.   And the third is what  
23      we have termed the general jurisdictional issues and,  
24      by that, I mean the issue of whether the Board should  
25      entertain, in the face of an existing provincial and

1 federal regulatory system, evidence on the alleged  
2 public health effects of the use of pesticides.

3 And I propose, Mr. Chairman, with your  
4 agreement to deal with them in that order.

5 THE CHAIRMAN: Very well.

6 MS. CRONK: By way of factual context,  
7 however, for these submissions, you have received both  
8 the submission from us on behalf of the OFIA and the  
9 OLMA which attempts to put in context, in a factual  
10 context the nature of the motion that's been brought  
11 before you, and there are really only three elements of  
12 those facts that we would ask you to take into account  
13 in considering the motion generally.

14 The first is this, and it is referred to  
15 in our factum and in greater detail in the factum of  
16 the MNR and; that is, that the very nature of the  
17 existing regulatory system, both at the federal and the  
18 provincial level, requires to support a registration  
19 application for use of a pest control product that such  
20 matters as toxicological data, scientific data  
21 regarding the potential human health effects of  
22 proposed pest control products, efficacy data and the  
23 like be submitted as part of an applicant's  
24 documentation submission to the appropriate regulatory  
25 agencies.

1                   That is true, Mr. Chairman, both at the  
2                   federal and the provincial level, and you will see when  
3                   you review, again through Ms. Murphy, the factum  
4                   produced by counsel for the MNR that the relevant  
5                   provisions have been detailed at considerable length  
6                   for you. So I don't propose to go through them again.  
7                   But it is with that threshold factual acknowledgment  
8                   that I would ask that you consider the matters before  
9                   you.

10                   The second is simply this: That in  
11                   November of 1988 the Federal Minister of Agriculture  
12                   for Canada, the Honourable David Mazenkowski, announced  
13                   a review of the federal pesticide registration process,  
14                   and there has been some brief mention of that already  
15                   by Mr. Castrilli this morning. And I would ask you, if  
16                   you would, very quickly to turn to Tab 1 of the book of  
17                   authorities filed on behalf of our clients. That has  
18                   the blue buff, unfortunately there may be two with blue  
19                   buff. It has a plastic cover and it is a blue cover  
20                   page. It's the book of authorities filed on behalf of  
21                   industry.

22                   THE CHAIRMAN: We have them here  
23                   somewhere. Just a moment.

24                   MS. CRONK: Thank you. If I could ask  
25                   you to turn to Tab 1 of that very briefly, Mr.

1 Chairman, you will see contained at that tab a copy of  
2 a press announcement by Agriculture Canada regarding  
3 that review that I have just described, and you will  
4 see that the press announcement was dated March 21st,  
5 1989, but I direct your attention to the third full  
6 paragraph which reads, if I may:

7 "The review process will involve an  
8 independent team consisting of the  
9 chairperson, the secretariate and an  
10 advisory board comprised of  
11 representatives from farm and forestry  
12 groups, the pesticide industry,  
13 environmental and consumer groups and  
14 concerned government departments."

15 And in the following paragraph it  
16 indicates what the nature of the review is, Mr.  
17 Chairman, and quite simply it's expressed to be, to  
18 quote:

19 "Thoroughly examine Canada's pesticide  
20 registration system with a view to the  
21 review team making recommendations for  
22 improvements in the registration process  
23 that respond to environmental and health  
24 concerns and serve the needs of the farm  
25 community. All interested parties will



1                   have an opportunity to make their views  
2                   known to the review."

3                   It was the view in perspective of our  
4                   clients that the fact of this review should be brought  
5                   to your attention in considering this motion so that  
6                   while you -- I'm sorry, sir.

7                   THE CHAIRMAN: Does the fact of this  
8                   review bear on, in your view, the jurisdiction  
9                   question?

10                  MS. CRONK: I would put it simply no  
11                  further than this, Mr. Chairman, because you will have  
12                  seen from the factum filed on behalf of industry that  
13                  we don't propose to deal in our submissions at any  
14                  great length at all with the general jurisdictional  
15                  question.

16                  We simply ask you to take into account  
17                  the fact of the existing system, regulatory system,  
18                  what is involved in it - and that has been laid out in  
19                  some detail for you in the MNR factum - and the fact of  
20                  this now current review, when you take into account the  
21                  matters that have been raised before you. I take it no  
22                  further than that, Mr. Chairman.

23                  THE CHAIRMAN: Okay.

24                  MS. CRONK: Mr. Castrilli has said in  
25                  passing with respect to the review that it does not

1 consider pesticide products per se, but rather only the  
2 registration process, and that's the review to which I  
3 have just directed your attention at Tab 1.

4 We would point out to two matters in that  
5 connection, Mr. Chairman, and ask you to take those  
6 factors into consideration as well. The first is that  
7 the process itself at the federal level is what  
8 requires the submission of effects data. It is the  
9 registration process that requires scientific study  
10 results, toxicological data to be submitted, that is  
11 inherent in the process of registration.

12 Secondly, as we understood a number of  
13 the submissions that had been made by Mr. Castrilli in  
14 his factum, it was in respect of the process that he  
15 complained, if I can put it that way, and the  
16 suggestion that both the federal and the provincial  
17 level of what I understood him to be suggesting to be  
18 an allegedly narrow opportunity for public input with  
19 respect to the use of pesticides. And we would ask you  
20 to note that the announced federal review that we have  
21 looked at specifically provides for input from  
22 interested parties.

23 And, again, we simply ask the Board in  
24 reaching its decision on this motion to be cognizant of  
25 that newly announced review, of its public input

1 provisions, at least as available on the public record  
2 to date, and the general regulatory scheme. And with  
3 that --

4 THE CHAIRMAN: Having brought that to our  
5 attention, may we conclude that you are not taking a  
6 position that we do not have the jurisdiction to make  
7 inquiries of our own?

8 MS. CRONK: We take no position on that  
9 matter at all, sir, and I will outline the reasons why,  
10 one way or the other.

11 THE CHAIRMAN: Okay.

12 MS. CRONK: If I could deal then with the  
13 narrower jurisdictional issue on which we wish to make  
14 specific submissions and that is what I have termed the  
15 jurisdiction to compel evidence.

16 You have heard lengthy submissions from  
17 both Mr. Castrilli and Mr. Campbell. It is our  
18 submission to you, for the reasons that I will outline,  
19 that the Board does not have jurisdiction to compel  
20 evidence through a party to the proceedings in the  
21 absence of that party's consent to do so.

22 The general rule at law in this regard is  
23 as stated by Mr. Castrilli. He referred you to  
24 paragraph 21 of our factum and in brief - I don't know  
25 that you need to go to it - but the general rule can be

1 quickly stated. It is simply this: That the  
2 presentation of evidence, including the calling of  
3 witnesses, is the province usually of counsel and not  
4 that of the trier of fact. And in my submission that  
5 is so whether it be a judge, as a trier of fact, or a  
6 tribunal member, as a decision-maker. And I will come  
7 back to that, Mr. Chairman.

8 That rule flows not from the re Enoch  
9 case, but rather from the re Fraser case which you will  
10 see contained at Tab 4 of the book of authorities filed  
11 on behalf of the industry. The same principle  
12 expressed in slightly different language was endorsed  
13 in the re Enoch case as well, but the language of the  
14 rule flows from the re Fraser case.

15 Having said that, there are powers which  
16 have been discussed in varying fashions this morning  
17 clearly of decision-makers which relate to the  
18 jurisdiction to compel evidence, but which must be  
19 distinguished from the jurisdiction to compel evidence  
20 through a party, and that is the material distinction,  
21 in my submission.

22 Those powers include clearly the power of  
23 the Board to seek the assistance of its own appointed  
24 expert. That's a power expressly conferred upon this  
25 Board both by statute and by your own rules. I refer

1 to subsection 8 of Section 18 to which reference was  
2 made this morning under the Environmental Assessment  
3 Act as confirmed by Rule 30 of your own rules.

4 That of course, Mr. Chairman, as the  
5 Board is aware, is not an unusual power, it has existed  
6 for a very long time both in the civil litigation  
7 context and in the administrative law context. But  
8 that is an example of a mechanism afforded expressly  
9 deriving from statute for the ability to compel certain  
10 types of evidence.

11 There are further examples. The power of  
12 the Board to compel evidence on the consent of the  
13 parties.

14 A third example, the subpoena power of  
15 tribunals, including a Board of this kind. That type  
16 of power is really a procedural mechanism to permit  
17 enforcement of the Board's process.

18 And, fourthly, there is of course the  
19 power of this Board and other tribunals to permit the  
20 calling of reply evidence and further evidence in  
21 appropriate circumstances by parties in addition to the  
22 proponent if the circumstances so warrant.

23 Those are all mechanisms, in my  
24 submission, Mr. Chairman, which conceptually flow  
25 directly from the ability to compel evidence, but they



1 have nothing to do with the jurisdiction to compel  
2 evidence through a particular party where the party is  
3 opposed to such an order.

4 Mr. Castrilli has raised some, as he  
5 described them, ten or eleven objections to the  
6 authorities that were put before you in support of the  
7 general legal principle that I have enunciated for you.  
8 I propose to deal very quickly with what I perceive to  
9 be the material objections that he has raised.

10 The first, as we understood it, was that  
11 he suggested that both Rule 4 of the rules of this  
12 Board and the Environmental Assessment Act itself  
13 permit such a compulsory order to be made. In our  
14 respectful submission, Mr. Chairman, a careful review  
15 both of the statute and of your rules makes it  
16 abundantly clear that there is no express, nor by  
17 necessary inference, jurisdiction to permit this Board  
18 to compel viva voce evidence against the wishes of the  
19 affected party.

20 I have already referred to Section 18,  
21 Subsection 9. In our submission, that merely provides  
22 the statutory authority for the Board to exercise its  
23 jurisdiction to seek its assistance itself through an  
24 expert for the Board. It bears no relation to the  
25 compulsion of evidence through another party. In our

1 submission, Section 4 of your rules is procedural in  
2 nature only and it, in essence, represents a  
3 codification of the Board's right to control its own  
4 process and nothing more.

5 In our submission as well, the compulsion  
6 of a witness through a party against the -- with the  
7 objection of that party is not a matter of mere  
8 procedure and should not be so regarded. It does  
9 indeed carry with it the substance of a matter that  
10 would be regarded by the courts on review as a matter  
11 of substantive order, and that carries with it review  
12 considerations that, in our submission, are relevant.

13 Mr. Castrilli also suggested that the --

14 THE CHAIRMAN: Excuse me.

15 MS. CRONK: I'm sorry, Mr. Chairman.

16 THE CHAIRMAN: Just going back to that  
17 last point. Would you, therefore, say that based on  
18 your submission of the state of the law on the  
19 jurisdiction of the Board to compel evidence against  
20 the wishes of a party, as applied to Rule No. 4, would  
21 fit under the part of that statement that indicates it  
22 can do to wherever it's necessary and permitted by law.  
23 Would your position be, in effect, it's not permitted  
24 by law?

25 MS. CRONK: That is exactly my

1 submission, Mr. Chairman.

2 THE CHAIRMAN: Okay.

3 MS. CRONK: And if you will recall that  
4 in the nature, as I framed the submission to you, I  
5 drew some distinction between viva voce evidence and  
6 implicitly documentary evidence, and I do think that  
7 that is inherent in viva voce evidence, of course being  
8 the oral evidence that witnesses give when they are  
9 sworn under oath before the panel; documentary evidence  
10 being of an entirely different character in nature.

11 And, yes, that is precisely our position,  
12 Mr. Chairman, that it is not expressly permitted by law  
13 and unless you can root that jurisdiction, source that  
14 jurisdiction in express authority, that the Board is  
15 without authority to so order in the face of opposition  
16 from the affected party.

17 That is not to say that the evidence  
18 cannot be obtained in other ways, but that is not the  
19 way in which it can be obtained in our submissin.

20 THE CHAIRMAN: And is it your submission  
21 that the law is not the same with respect to the  
22 production of documents?

23 MS. CRONK: That is quite correct, sir.

24 THE CHAIRMAN: Thank you.

25 MS. CRONK: And I could, if it would be

1 of assistance to the Board, trace that very distinction  
2 as long developed through the courts --

3 THE CHAIRMAN: No, I think I'm aware of  
4 the cases in that area.

5 MS. CRONK: That's quite right, sir.  
6 Yes, that is exactly our submission.

7 Mr. Castrilli as well suggested, as we  
8 understood his submission, that the authorities cited  
9 in support of the submissions that I have just put to  
10 you are applicable only in a civil litigation context  
11 and do not have any relevance or application to  
12 administrative tribunals such as this Board.

13 He suggested as well that the authorities  
14 were old, that they pre-dated the Environmental  
15 Assessment Act and somehow I took from that a remark by  
16 implication that they were of less authority given the  
17 passage of time.

18 Our response to that is quite simple, Mr.  
19 Chairman, it is this: That the authorities themselves  
20 make it clear that they concern adversarial proceedings  
21 and that they are not restricted to matters of a pure  
22 lis between parties. And I would ask you, because you  
23 have not been asked yet, to look directly at the  
24 authority, to look first if you would at Tab 2 of our  
25 book of authorities.

1 THE CHAIRMAN: You don't happen to have  
2 an extra copy of your --

3 MS. CRONK: I believe I do, sir.  
4 (handed)

5 MR. MARTEL: Thank you.

6 MS. CRONK: You will see at Tab 2, Mr.  
7 Chairman, and members of the Board, an extract from a  
8 text well known to advocates by Sopinka and Lederman on  
9 matters of evidence in civil cases, and I would direct  
10 your attention to the section beginning under paragraph  
11 (d), Examination of Witnesses, with the paragraph  
12 beginning:

13 "Under the adversary system of justice,  
14 the calling of witnesses is the function  
15 of the parties and not the court."

16 Then the authors go on to cite the re  
17 Fraser case to which I alluded a few moments ago, and  
18 to quote from that case for the authority of that  
19 proposition, and the quote reads as follows:

20 "The court has apparently no power of its  
21 own motion and without the consent of  
22 both parties to direct further evidence  
23 to be given. See in re Enoch."

24 And continuing:

25 "The parties and not the court are domini



1                   litus in all civil proceedings. If a  
2                   party comes into court with an imperfect  
3                   case, the proper penalty is dismissal."

4                   Now that, as Mr. Castrilli, quite  
5                   correctly pointed out, is a statement applicable to a  
6                   civil case, but you will note that the authorities  
7                   suggest that it applies in any adversarial proceeding.

8                   And I wish, Mr. Chairman - mindful of the  
9                   discussion that you had with Mr. Campbell this  
10                  morning - to indicate to the Board that we support the  
11                  submissions that he made and, in our submission, the  
12                  nature of the proceeding, this particular hearing and  
13                  proceedings such as this, are really a blend of what,  
14                  in the traditional non-administrative law context,  
15                  might be called an adversarial proceeding, but also one  
16                  that is information gathering in the public interest.

17                  And in our submission to you, you are  
18                  conducting pursuant to your empowering statute, a  
19                  blended proceeding of that kind. Given that it is  
20                  blended, it follows, in our submission, that the  
21                  general rules applicable to procedural and substantive  
22                  fairness in adversarial proceedings cannot be easily  
23                  departed from.

24                  I would take you next, if I could -  
25                  because in my submission this specifically confirms the

1 application of the general principle to the  
2 administrative law context - to Tab 5, and this is an  
3 extract again from a textbook in the area that's, of  
4 course as you know, Mr. Chairman, well known to those  
5 of us who practice before tribunals and the courts, and  
6 I would direct your attention to the last paragraph  
7 beginning at page 36 which reads:

8 "The responsibility for calling witnesses  
9 is that of counsel, not the court."

10 In Harwood and Cooper vs. Wilkinson,  
11 Associate Chief Justice Ridel said:

12 "Counsel and not the court was the sole  
13 and only judge as to what witnesses to  
14 call. While the court may suggest it has  
15 neither the duty nor the power to call a  
16 witness proprio motu in a civil case,  
17 although of course he may recall one who  
18 has been examined; counsel, not the  
19 judge, is to determine what witnesses he  
20 is to call in support of his case and  
21 while the judge has the right to comment  
22 upon and base his judgment pro tanto on  
23 the non-production of any witness or  
24 witnesses, he has no right to criticize  
25 the discretion observed by counsel in so

1                   deciding."

2                   And if I could simply stop there. The  
3 principle simply means that failure to call a witness  
4 who is subsequently determined to have been material  
5 will empower the decision-maker to draw an inference in  
6 appropriate circumstances against the party who failed  
7 to call the witness. But the choice in the first  
8 instance, as to whether to call the witness, is that of  
9 counsel and not the decider of fact.

10                  And it follows from that, as has been put  
11 to you in the factum of the MNR and in our own, that  
12 the party who makes the decision bears the  
13 consequences, and that's not a novel principle.  
14 Clearly, if your case comes before the Board with  
15 deficiencies, you bear the consequences of that  
16 directly.

17                  But I would ask you as well --

18                  THE CHAIRMAN: Sorry.

19                  MS. CRONK: Yes, Mr. Chairman?

20                  THE CHAIRMAN: The Harwood and Cooper vs.  
21 Wilkinson case, did that involve a tribunal?

22                  MS. CRONK: I will check that in my  
23 materials, Mr. Chairman. I can't answer that question  
24 immediately for you.

25                  I would ask you as well, if you would, to

1 consider the next passage at page 37, a reference to a  
2 case, an Ontario case, Conner vs. Township of Brant in  
3 which the Associate Chief Justice is quoted as having  
4 said:

5 "It is quite true that the functions of  
6 tribunals appointed to determine cases  
7 are primarily and essentially judicial  
8 not inquisitorial. The tribunal is to  
9 judge and decide. To supply the proofs,  
10 the materials for decision, belongs in  
11 general to the litigant parties."

12 In my submission, those authorities in  
13 general terms suggest that the rule bears no difference  
14 between the civil litigation context and the  
15 administrative law context, although I acknowledge that  
16 it is not as overwhelmingly clear as I at the podium  
17 today would like it to be. In my submission, the  
18 principle is there, that it applies in situations of  
19 this kind as well.

20 Mr. Castrilli also suggested that there  
21 was no direct authority for the application of the  
22 principle before administrative tribunals. And over  
23 the break, Mr. Chairman, we provided our friends with  
24 copies of a case that was not included in our book of  
25 authorities. It is a decision first, in first

1 instance, of the British Columbia Supreme Court upheld  
2 then on appeal by the British Columbia Court of Appeal  
3 in Kuntz vs. College of Physicians and Surgeons of  
4 British Columbia, and I would like to provide the Board  
5 with a copy, if I may.

6 THE CHAIRMAN: Very well.

7 MS. CRONK: (handed)

8 THE CHAIRMAN: Thank you.

9 MS. CRONK: This was a decision, Mr.  
10 Chairman, in first instance of the equivalent of the  
11 Discipline Committee of the College of Physicians of  
12 Ontario applying in the British Columbia context.

13 It was a situation in which a  
14 physician -- it was alleged that a physician's practice  
15 was not up to the standards of the profession  
16 warranting revocation of his licence and some very  
17 specific allegations were made against the doctor.

18 What's important is that the Discipline  
19 Committee, in the case of British Columbia called it a  
20 Council, of the College of Physicians and Surgeons  
21 administrative tribunal that happens to have the  
22 mandate and the responsibility to maintain professional  
23 standards in the communities of physicians in that  
24 province.

25 What happened in that case was that an



1 investigation was conducted by the Council - the  
2 Discipline Committee, I use that language simply  
3 because Ontario lawyers are more familiar with it, but  
4 in B.C. it is called the Council - conducted an  
5 investigation of the doctor's practice and an  
6 investigation report was prepared by two other  
7 physicians which was highly critical of the doctor and  
8 it quoted a number of experts in the report whose  
9 opinions were also critical of the doctor.

10 The investigation report was produced at  
11 the hearing but the authors of the report were not and  
12 were not made available for cross-examination and,  
13 similarly, the persons whose opinions were also  
14 contained in the report, the other physicians, were not  
15 produced for cross-examination.

16 The doctor brought a motion before the  
17 Disciplinary Committee seeking an order compelling  
18 counsel for the Disciplinary Committee, the lawyers for  
19 the Disciplinary Committee, as part of their  
20 prosecution of his case to call the physicians who had  
21 authored that damaging report and to expose them to  
22 cross-examination in the interests of what the doctor  
23 described as preservation of the rules of natural  
24 justice. And he took the position that if they were  
25 not produced for cross-examination, the investigation

1 report should be withdrawn and that it couldn't be used  
2 in evidence against him.

3 Now, I recognize immediately, Mr.  
4 Chairman, the distinctions between a hearing of that  
5 kind and a tribunal of that kind and a Board such as  
6 the Environmental Assessment Board. But on the heels  
7 of that, I also submit to you --

8 THE CHAIRMAN: Is one of the differences  
9 you are recognizing the fact that this Disciplinary  
10 Committee had no power of decision?

11 MS. CRONK: It is that, but it is also  
12 the fact that it affected an individual whose  
13 livelihood and professional standing flowed from any  
14 decision that the Council might make and, in fact, if  
15 the Council had decided to revoke the licence of the  
16 doctor that was only ultimately reversible by the  
17 College of Physicians as a whole or by the courts. So  
18 it is an arguable point as to whether their decision  
19 was final in that regard. As you know, of course, in  
20 this province their decision is, subject to court  
21 review.

22 No, when I was recognizing the  
23 distinction it was primarily on the basis that it was a  
24 very direct hearing affecting the rights of a  
25 particular individual and, in my submission, that

1       assists in the submission that I am going to make to  
2       you because it is precisely in hearings of that kind  
3       that the courts have held consistently that the highest  
4       standards of procedural fairness must be maintained and  
5       the highest standards of natural justice must be  
6       maintained because of the consequences for the  
7       individual.

8                       The Council -- when the doctor brought  
9       his motion before the Discipline Committee, the Council  
10      of the College, they held that they were not required  
11      to and should not call the doctors who authorized the  
12      report, that they were not required to put them up for  
13      cross-examination, but that the physician was free  
14      himself to do so, in the sense that he could call them  
15      as his own witnesses, he could request the Council to  
16      issue a subpoena requiring their attendance and, in  
17      that way, there was a mechanism by which the  
18      information could come before the tribunal short of the  
19      tribunal compelling its lawyers to call those  
20      individuals as witnesses.

21                      THE CHAIRMAN: Did they deal in the case  
22      with the question of, if the doctor had called the  
23      witness he would be entitled to cross-examine the  
24      witness?

25                      MS. CRONK: That point is not discussed,

1 Mr. Chairman.

2 The case was appealed, was taken to the  
3 British Columbia Supreme Court, the court upheld that  
4 decision. A further appeal was taken to the Court of  
5 Appeal and again the decision was upheld.

6 And I would direct your attention perhaps  
7 in the first instance to the headnote at page 2 --  
8 sorry, it's page 188, page 2 of the copy I have given  
9 you, and immediately before the recitation of all the  
10 authorities, I would ask you to look at the second  
11 preceding paragraph beginning with the words:

12 "The Council was entitled to rely upon  
13 the report..."

14 And the last sentence of that paragraph  
15 summarizes this aspect of the decision upon which we  
16 rely and that is:

17 "...nor was the Council obliged to  
18 subpoena those to whom remarks were  
19 attributed particularly given that K..."  
20 K was the doctor:

21 "...had the right to do this himself."

22 Then I would refer you as well, Mr.  
23 Chairman, and members of the Board, to page 198 of the  
24 decision. Page 198 on the left beginning with the  
25 first full paragraph, reads as follows:

1 "If the petitioner wishes to challenge or  
2 controvert the findings of those doctors  
3 (i.e., Doctors Patterson and  
4 McConkie)..."

5 They were the authors of the report:

6 "...and others to whom the investigating  
7 committee refer, he may subpoena those  
8 Doctors, the hospital officials and  
9 medical charts referred to in the report,  
10 call evidence essentially to rebut the  
11 allegations that had been made against  
12 him and to deal with the allegations that  
13 had been made regarding his alleged  
14 unprofessional conduct."

15 And then the court continues:

16 "But I do not consider that the  
17 petitioner has shown that it is necessary  
18 that he cross-examine the members of the  
19 investigating committee in order to  
20 accomplish any challenge or rebuttal  
21 which he may wish to make."

22 And then over at page 200, Mr. Chairman,  
23 the court expressly finds in the first full paragraph  
24 quote:

25 "Nor is there an onus upon the Council to



1 subpoena witnesses to whom the  
2 investigators have attributed comments.  
3 Dr. Kuntz has his own right to subpoena  
4 witnesses under Section 60 of the Medical  
5 Practitioners' Act."

6 And, as I said, Mr. Chairman, this case  
7 was upheld by the British Columbia Court of Appeal. We  
8 place it before you simply in support of this  
9 proposition and; that is, that it is a most unusual  
10 circumstance indeed under our law for a tribunal to  
11 compel, in the face of opposition from the affected  
12 party, in mandatory terms the production of a witness.

13 The more particularly is that so when  
14 there are a number of routes by which that evidence  
15 might otherwise be placed before the Board. In this  
16 case, Forests for Tomorrow has come before you  
17 effectively saying: We wish and think it proper and  
18 the duty of MNR to either retract the Ritter document -  
19 and I concentrate on that for a moment - or to call Mr.  
20 Ritter or another like witness to give this evidence.

21 They have not told the Board, and I made  
22 particular note of this in Mr. Castrilli's submissions  
23 this morning, you have not been told by Forests for  
24 Tomorrow that they have asked directly of that proposed  
25 witness for his participation in the hearing and been

1 refused. You have not been told that other such  
2 witnesses are not available to Forests for Tomorrow.  
3 Rather, all you have been told is that Forests for  
4 Tomorrow believes it would be more appropriate if the  
5 MNR called such a witness.

6 And, in my submission, it is the rare  
7 case indeed, if at all, that such a profound departure  
8 from the normal practice should be undertaken in the  
9 fase of quite clear opposition and in advance of your  
10 hearing the evidence upon which the MNR wishes to rely.

11 THE CHAIRMAN: Ms. Cronk, just going back  
12 to the case that you filed with us, back to page 198,  
13 if I might. That paragraph that you read, particularly  
14 the last sentence where the courts says:

15 "But I do not consider that the  
16 petitioner has shown that it is necessary  
17 that he cross-examine the members of the  
18 investigating committee in order to  
19 accomplish any challenge or rebuttal that  
20 he may wish to make."

21 MS. CRONK: Yes, Mr. Chairman.

22 THE CHAIRMAN: Why do you suppose the  
23 petitioner would want to call -- sorry, why do you  
24 suppose that the petitioner would want to question the  
25 Committee if it wasn't in terms of cross-examining that

1 investigating committee?

2 MS. CRONK: Mm-hmm.

3 THE CHAIRMAN: In the context of the  
4 case, the investigating committee came out with a very  
5 damaging report against the petitioner, the petitioner  
6 wanted the Council to call the witness, presumably so  
7 he could cross-examine--

8 MS. CRONK: Yes.

9 THE CHAIRMAN: --those witnesses. I  
10 don't understand why the court is making the statement  
11 that the petitioner has not shown that it's necessary  
12 he cross-examine the investigating committee in order  
13 to accomplish what he wants to accomplish.

14 Surely they are not suggesting, or maybe  
15 they are suggesting, that he would just want to  
16 question them in terms of leading them through a direct  
17 testimony. Surely he would want to question them in a  
18 very critical fashion--

19 MS. CRONK: Yes.

20 THE CHAIRMAN: --to test their  
21 allegations made against him. Would that not be the  
22 case?

23 MS. CRONK: I would have thought so, Mr.  
24 Chairman. But, in my submission, there are a number of  
25 inter-related principles here, knowing something about

1       these kinds of hearings.

2                       In my submission, what the court was  
3       suggesting is that there are a number of ways to meet  
4       damaging opinion evidence. One way is to call experts  
5       of your own simply to contest the opinions that have  
6       been expressed; another way is to cross-examine the  
7       authors of the damaging opinions either on the basis of  
8       an attack on credibility or methodology, whatever means  
9       are available to you, to minimize or completely cast  
10      into doubt the reliance of what has been written.

11                     I take from a review of the case as a  
12      whole and, in particular, the preceding sentence when  
13      the court lists the type of evidence that the doctor  
14      could compel quite freely, medical or documentary  
15      evidence, as well as a subpoena to these doctors that  
16      the court was reacting to the whole panoply.

17                     THE CHAIRMAN: So they are not suggesting  
18      that he wouldn't want as his prime purpose to be able  
19      to cross-examine?

20                     MS. CRONK: Oh, I think it was quite  
21      clear that that is what he wanted as his prime purpose.

22                     THE CHAIRMAN: And they are just saying  
23      that your objectives can be met--

24                     MS. CRONK: Precisely.

25                     THE CHAIRMAN: --other than by calling

1       those witnesses?

2                       MS. CRONK:  Yes.  Including by requiring  
3       by subpoena duces tecum the documents that he needed  
4       from the medical authorities, as well as calling expert  
5       opinion evidence of his own through physicians of his  
6       choosing.

7                       The question you put to me, Mr. Chairman,  
8       lies with equal force of course in this case and that  
9       was why I put to you our observations as to what you  
10      had and had not been told today in submissions from  
11      Forests for Tomorrow.

12                      It would be an appropriate inquiry for  
13      the Board, in my submission, to ask why it is that  
14      Forests for Tomorrow wants MNR to call this witness  
15      when its clearly open to Forests for Tomorrow to do so  
16      itself and, in my submission to you, the effect of so  
17      doing - I don't suggest the motive - but the effect of  
18      so doing is to achieve a procedural right not otherwise  
19      available to them and; that is, the right to  
20      cross-examine.

21                      Because clearly when you call the witness  
22      yourself, you are bound by the rules of  
23      evidence-in-chief and you also as counsel attest to a  
24      certain degree to the credibility, not the truth of  
25      what is said, but the credibility of the witness to



1 give evidence under oath. And there are all those  
2 implications of calling the witness yourself.

3 So your question I would suggest is as  
4 appropriate to what is now immediately before you as it  
5 was in that case. The fact of the matter is, is that  
6 very often in the course of a proceeding, any type of  
7 proceeding, counsel often wishes that perhaps the  
8 calling of witnesses happened a little differently so  
9 that you had a cross-examination right where perhaps  
10 you are not entitled to it.

11 THE CHAIRMAN: I take it that from what  
12 you previously said that, should the witness that  
13 Forests for Tomorrow wishes to call not wish to  
14 participate, that that wouldn't impune their right to  
15 attempt to subpoena that witness.

16 MS. CRONK: Absolutely not, sir. It  
17 would be perfectly free and open to do so.

18 THE CHAIRMAN: As an additional  
19 alternative?

20 MS. CRONK: Absolutely, yes. But you  
21 have been told neither, of course.

22 THE CHAIRMAN: Right. Okay.

23 MS. CRONK: We wish to address very  
24 briefly as well, Mr. Chairman, the suggested  
25 consequences of failure to call a witness and I have

1 already alluded to that very briefly.

2 As suggested by Messrs. Sopinka and  
3 Lederman in the extract that we looked at Tab 1, if a  
4 party comes before a decision-maker, be it a Board of  
5 this type or any other officer of the law seized with  
6 responsibility for deciding material matters, with an  
7 imperfect case, the result quite simply is dismissal,  
8 is rejection of the relief sought. And, in our  
9 submission, that is no different in an administrative  
10 hearing of this kind or in the civil litigation  
11 context.

12 In this case, the consequences of  
13 deficiency in an environmental assessment submitted to  
14 you is simply not to accept the assessment, not to  
15 approve it or to approve it subject to terms and  
16 conditions. There are a variety of clear express  
17 jurisdictional powers that this Board has to deal with  
18 that situation, but the consequences are borne by the  
19 proponent.

20 THE CHAIRMAN: What about the case in the  
21 administrative context where the Board is not satisfied  
22 with the evidence before it on a particular issue but  
23 clearly feels that the overall undertaking is in the  
24 public interest and does not wish to avail itself of  
25 the choice of dismissing the undertaking or prohibiting

1 the activity sought to be approved because of the  
2 overriding public interest concerns which, in its mind,  
3 overrides the failure by a particular party to put  
4 forward the evidence to a degree of sufficiency that  
5 the Board felt should have been put forward?

6 MS. CRONK: In my submission, Mr.  
7 Chairman, like Mr. Campbell, that is precisely one of  
8 the reasons why the commission power is contained in  
9 your legislation. And depending on how significant the  
10 matter is, it is something that is often dealt with by  
11 way of conditions attaching to approval which, if not  
12 honoured and performed, permit the carrying forward of  
13 the project, at least in that aspect. That is, I would  
14 suggest respectfully one of the intended purposes of  
15 that provision of the legislation.

16 THE CHAIRMAN: Thank you.

17 MS. CRONK: And not exclusive to this  
18 tribunal, I might add in any situation where a  
19 decision-maker has the authority to approve in part or  
20 whole or to attach terms and conditions which have to  
21 be satisfied before full approval goes forward. That  
22 is not, of course, uncommon in any number of  
23 situations.

24 We wish to deal very briefly as well, Mr.  
25 Chairman, with the issue of alleged unfairness to

1 Forests for Tomorrow in the event that the MNR is not  
2 compelled to call the requested type of witness,  
3 whether it be Mr. Ritter or some other similarly  
4 qualified individual.

5 In our submission, Mr. Chairman, save  
6 only for restrictions of relevancy, any party is free  
7 to tender such evidence before you during the course of  
8 this hearing as it deems appropriate and ultimately the  
9 only constraint upon the ability to do so is relevancy  
10 which is the threshold test which must be met every  
11 time one tenders a document and every time one tenders  
12 a witness, lay or expert. There is nothing unusual in  
13 this situation about that aspect of the matter.

14 It follows, therefore, in our submission  
15 that a decision by the Board at this time not to compel  
16 a party to call a particular witness or witnesses does  
17 not preclude any other party, not just Forests for  
18 Tomorrow, any other party to these proceedings to seek  
19 to tender evidence on this very subject before you  
20 should they, in their judgment in the future, perceive  
21 that it is necessary or desirable in the interests of  
22 their clients.

23 THE CHAIRMAN: So I take it that you are  
24 advocating the position that those in opposition are  
25 not just restricted to rebutting the case before them?

1 MS. CRONK: Let me deal directly with  
2 that because that is indeed the next point, Mr.  
3 Chairman. You put it quite appropriately in terms of  
4 the submission we make to you.

5 Forests for Tomorrow, through Mr.  
6 Castrilli this morning, has said that the role of  
7 Forests for Tomorrow is to call rebuttal evidence and,  
8 in our submission, if that is so it's purely a function  
9 of self-definition and self-imposition. That is not  
10 the role of parties to a proceeding and that is not --  
11 let me rephrase that. The role of parties before you,  
12 apart from the proponent, is not so limited at law.

13 And if Forests for Tomorrow wish to take  
14 that view of the matter and to proceed in that fashion  
15 that is, of course, its right; but it is not required,  
16 nor is it implicit either by the manner in which this  
17 case has proceeded or by the legislation in our  
18 submission and it is certainly not the experience in  
19 many other hearings of this kind.

20 I support Mr. Campbell's submissions to  
21 you this morning that intervenors are free to  
22 supplement evidence, to depart from it by leading  
23 evidence in the first instance on matters that they  
24 submit are relevant to you and, in general, to deal  
25 both with matters raised by the proponent and matters



1 not raised by the proponent if they can persuade you  
2 that the matters are relevant.

3 In short, Mr. Chairman, any intervenor is  
4 free to call a positive case as well as a defensive  
5 case and I, therefore, share the view that a rebuttal  
6 approach is not the mandatory approach, although of  
7 course if a party decides to so deduct itself, that is  
8 entirely its right to do so.

9 THE CHAIRMAN: And I take it that it  
10 follows from that that an intervenor could  
11 theoretically shore up a proponent's case?

12 MS. CRONK: Absolutely.

13 THE CHAIRMAN: Thank you.

14 MS. CRONK: If the Board required any  
15 precedent in that regard, I would be only too glad to  
16 provide it based on other cases, but that is my view of  
17 the law, sir.

18 THE CHAIRMAN: Thank you.

19 MS. CRONK: Finally then, sir, the  
20 alternative relief that Forests for Tomorrow has  
21 requested of you is what I referred to as the issue as  
22 to whether the Board should require the withdrawal of  
23 portions of the statements of evidence submitted by the  
24 MNR for Panels 12 and 13, and if I could deal with that  
25 very briefly.

1                   We are really talking about three  
2           different things: First the Ritter document -- what we  
3           have described as the Ritter document; secondly,  
4           paragraphs 1, 2 and 3 of Panel 12 which appear at page  
5           66; thirdly, paragraph 1 at page 65 of Panel 13.

6                   With respect to the first item, the  
7           Ritter document, the Panel 12 evidence package makes it  
8           quite clear both in the index to the document and in  
9           the section of the document, the overall panel evidence  
10          document in which the Ritter document is contained,  
11          that it was tendered purely for informational purposes  
12          only. There is no suggestion either in the Panel 12  
13          evidence statement itself nor in the submissions made  
14          by the MNR in their factum to you that the MNR relies  
15          on it in an evidentiary sense or that the evidence in  
16          any way flows from it.

17                   And in any event, in my submission to  
18          you, the matter on that document is now moot because  
19          the MNR in its factum to you has indicated to you that,  
20          on consent, it is prepared to withdraw the document  
21          recognizing that it was provided purely for  
22          informational purposes and that it doesn't rely on it  
23          for the evidence it intends to lead with respect to the  
24          matters covered in Panel 12.

25                   So in my --

1                   THE CHAIRMAN: What is your position, Ms.  
2 Cronk, on a situation whereby a party tenders evidence  
3 for a particular purpose, it is admitted into evidence,  
4 is the Board confined to viewing that evidence only on  
5 the basis for which it was tendered?

6                   MS. CRONK: Assuming that it was evidence  
7 in the first instance, that it was evidence in the  
8 first instance and was received by the Board as such,  
9 it can be used for all purposes once it becomes part of  
10 the record.

11                  THE CHAIRMAN: So you are making a  
12 distinction over the fact that if it was submitted for  
13 information purposes only and not something upon which  
14 the party submitting it relied, it would not be  
15 evidence?

16                  MS. CRONK: I am, Mr. Chairman. The  
17 process that has evolved at this hearing and through  
18 the Board's rules, in this regard the prior production  
19 of witness statements and evidence statements is  
20 designed to expedite and facilitate disclosure in a  
21 timely way both for the assistance of the Board and for  
22 other parties, but at end of the day when measured  
23 against the legal test, it does not form part of the  
24 evidence until the Board formally receives it and the  
25 matter is proven before you, and it's proven by the

1 authors of the documents whose opinions are expressed  
2 in that evidence package confirming and endorsing those  
3 opinions before you and only then does it become part  
4 of an evidentiary base before you.

5 I regard it in this instance, Mr.  
6 Chairman, as nothing more than a bibliograph -- similar  
7 to a bibliography provided, in the sense that if one  
8 provides in a scientific paper a list of other source  
9 documents in the same way that one would with a  
10 syllabus to a course, it doesn't mean that opinion  
11 evidence is going to be lead in support of each and  
12 every of those references.

13 THE CHAIRMAN: Well, I'm trying -- I  
14 understand what you are saying, but I'm trying to  
15 distinguish a situation because of the Board's recent  
16 practices of not requiring parties in every instance to  
17 go through page-by-page every document that is filed  
18 and, more or less, to highlight those documents that  
19 are filed by way of witness statements or supplementary  
20 documents, so that the oral portion of the hearing  
21 would be expedited, and the fact that a party  
22 contains -- or includes documentation of an  
23 informational nature within their package and the fact  
24 that they don't, in oral testimony, specifically  
25 confirm those particular items or positions that are

1 contained within the witness statement.

2 Are you suggesting that if they are not  
3 referred to in evidence and confirmed orally--

4 MS. CRONK: No, Mr. Chairman.

5 THE CHAIRMAN: --that they aren't in  
6 evidence?

7 MS. CRONK: No, Mr. Chairman, I'm not.  
8 What I meant by that was, if you take an example of an  
9 evidence package that has been co-authored by eight or  
10 nine individuals and it is ultimately tendered as one  
11 package before you, so long as those individuals are  
12 produced and are available to the Board for questions  
13 that the Board might have, in theory - I'm not  
14 suggesting it would be appropriate in a hearing of this  
15 kind - but, in theory, one can put the witness up, mark  
16 the report, and sit down and turn the witness over to  
17 cross-examination and to questioning from the Board and  
18 that is entirely proper. So my submission was not  
19 intended to suggest that.

20 In this particular case, Mr. Chairman, I  
21 think the matter almost moot and, in my submission to  
22 you, where some -- hypothetically, where some real area  
23 of difficulty might be encountered is if a document  
24 came to form part of the record in that way and then at  
25 the end of the day some reliance was placed upon it by



1 the person who tendered it in the first instance, that  
2 might very well be improper depending on the  
3 circumstances. But that's not what you are faced with  
4 today. What you are faced with --

5 THE CHAIRMAN: But how do you get around  
6 with the fact that the document was tendered by the  
7 proponent in their evidence package?

8 MS. CRONK: Well --

9 THE CHAIRMAN: It hasn't been admitted  
10 yet, I can understand that, but--

11 MS. CRONK: Exactly.

12 THE CHAIRMAN: --but the fact that they  
13 tendered it in the beginning as an indication to the  
14 other parties of what they were going to address in  
15 terms of their evidence, is not there a question by  
16 making that choice initially that the party including  
17 it is intending that it be part of the evidence?

18 MS. CRONK: Had the document been silent  
19 on the issue I would agree with you, sir, but the  
20 document wasn't, the document in at least three places  
21 very prominently indicated that the Ritter document was  
22 provided for informational purposes only, so that all  
23 recipients of that package knew that it was in a  
24 different category than the remaining contents of that  
25 document.

1                   And in those circumstances, in my  
2                   submission, (a) it has not been tendered before you,  
3                   (b) it has not been admitted, and (c) -- I'm sorry.

4                   THE CHAIRMAN:   Sorry, go ahead.

5                   MS. CRONK:   And (c) anyone who actually  
6                   reads the evidence package can see that it bears on its  
7                   face a different characterization or treatment.   So I  
8                   don't think you can infer from it an intention to rely  
9                   on it, in my submission.

10                  In any event, even if one could, Mr.  
11                  Chairman, the fact is because it hasn't been formally  
12                  tendered before you, it's not yet part of the record,  
13                  it's not yet part of your evidentiary base, it can be  
14                  withdrawn at any time by the party who adduces it in  
15                  the first instance.

16                  THE CHAIRMAN:   So you are suggesting that  
17                  notwithstanding witness statements are distributed,  
18                  notwithstanding the witness statements are subjected to  
19                  a scoping process, that prior to actually addressing  
20                  the matters in that witness statement and through a  
21                  particular panel, anything can be withdrawn?

22                  MS. CRONK:   Yes, Mr. Chairman, that would  
23                  be my position.   In the same sense that were it  
24                  otherwise, hypothetically, a party could produce any  
25                  number of reports which ultimately could be shown to be

1 irrelevant, ultimately could be shown to be authored by  
2 people who are not qualified to author them and about  
3 which objection might be taken at the beginning of  
4 evidence.

5                   Clearly the mere distribution of  
6 documents doesn't afford it, implicitly or explicitly,  
7 an admissibility status that it might not otherwise  
8 have.

9                   THE CHAIRMAN: No, I am not questioning  
10 the fact that the documents contained in witness  
11 statement may ultimately be ruled by the tribunal to be  
12 inadmissible for any number of reasons, relevancy being  
13 one; I am just questioning the fact that: Is it your  
14 view that the party tendering the document in the first  
15 place or including it within the witness package can  
16 withdraw it at any time up to the point where it is  
17 asking for its formal admission as evidence?

18                   MS. CRONK: That would be my preliminary  
19 view of the matter, Mr. Chairman. And obviously  
20 concentrating my attention as I was on the Ritter  
21 document which, in my submission, falls in a different  
22 category - it's not a matter I thought about at  
23 length - and if it were to be of assistance to the  
24 Board, clearly I would do that. But, yes, as counsel  
25 my immediate reaction is the one I have given you.

1 THE CHAIRMAN: Okay.

2 MS. CRONK: With respect to the other  
3 paragraphs that have similarly been challenged both in  
4 Panel 12 and 13, if I could ask you very quickly just  
5 to look at the ones in Panel 12, for example, that have  
6 been impuned at page 66, paragraphs 1, 2 and 3.

7 In essence, Mr. Chairman, in our  
8 submission, these paragraphs and paragraph 1 in Panel  
9 13 as well do three things:

10 First, they contain a description of the  
11 essential components of the existing regulatory scheme  
12 for the use of pest control products, both at the  
13 federal and the provincial level. It is a description  
14 of legislation of a regulatory scheme that exists  
15 today; secondly, it is a description of the proponent's  
16 formal position before the Board with respect to that  
17 regulatory scheme; and, thirdly, it is a description of  
18 the issues concerning the use of pesticides generally  
19 as perceived by the Ministry of Natural Resources.

20 And each of the four impuned paragraphs,  
21 both in this panel -- these 3 in this panel and  
22 paragraph 1 in Panel 13 fall into one of those three,  
23 either descriptive paragraphs, descriptive of a  
24 regulatory system, or are descriptive of a formal legal  
25 position.

1                   Now, in our submission on the first  
2                   matter, a description of an existing regulatory scheme  
3                   is something that is open to any party to address at  
4                   any time as a matter of general law before the Board;  
5                   it is something in respect of which the Board has clear  
6                   authority to take judicial notice, and it could have  
7                   been done in final argument, it could have been done at  
8                   outset of the panel's evidence, or it could have been  
9                   done in writing, and that is what has happened here,  
10                  it's been done in writing.

11                  It is nothing more than a description of  
12                  an existing matter of general law, regulatory scheme  
13                  and, in our submission, requiring its withdrawal,  
14                  absent the consent of the MNR, is neither warranted nor  
15                  would it be appropriate because it's something that  
16                  counsel could say orally before you at any time if it  
17                  was appropriate to the matters you were then  
18                  considering.

19                  Secondly, with respect to a statement of  
20                  the MNR's legal position, we make the same submissions.  
21                  Counsel and any party are free, subject to receiving  
22                  direction from the Board, to outline for the assistance  
23                  of the Board and for clarification to other parties  
24                  their legal position on overall issues in the hearing,  
25                  on any sub-set of issues in the hearing, and on any



1 panel of evidence at any time, subject only to whether  
2 it is of assistance to the Board. Requiring withdrawal  
3 of the enunciation of a legal position is, in my  
4 restful submission, unprecedented and unwarranted.

5 Again, one can quarrel with whether it  
6 was best done in writing but surely that is not the  
7 issue; the issue is whether the right is there to do it  
8 at all and, in my submission, it isn't.

9 Then finally, Mr. Chairman, dealing with  
10 what we have termed the general jurisdictional issues  
11 before the Board, it will be the evidence of our  
12 clients before the Board that the industry in its use  
13 of pest control products in the area of the undertaking  
14 relies on the adequacy and sufficiency of the federal  
15 and provincial regulatory schemes for determination of  
16 the safety of the products, so registered, classified  
17 and authorized for use.

18 MR. MARTEL: Can I ask a question at this  
19 point, Ms. Cronk?

20 MS. CRONK: Yes, Mr. Martel.

21 MR. MARTEL: It has been bothering me for  
22 some time, you have made reference to it on several  
23 occasions, so has the Ministry.

24 But in view of the fact that the federal  
25 government has now established someone to look into --

1 the review team will be recommending improvements to  
2 the registration process, which has been in place for a  
3 number of years, is there not some concern that maybe  
4 there was something wrong with the process, the  
5 possibility of something wrong in that process that can  
6 cause people concern?

7 MS. CRONK: It may be, Mr. Martel,  
8 although I can't speak for a client who is not mine.  
9 That you will hear some evidence on that, I do not  
10 know.

11 I can only say, sir, that so often when  
12 entities of this kind are created for review purposes,  
13 it is perhaps imprudent to too early draw an inference  
14 as to why it was created.

15 MR. MARTEL: But surely it leaves the  
16 question in one's mind at the time?

17 MS. CRONK: It may simply be an effort,  
18 sir, to better improve an already stringent system. It  
19 depends how one looks at the matter, I would have  
20 thought.

21 And finally, sir, with respect to the  
22 general jurisdictional issues. In essence, the main  
23 submission that we wish to make to you is that it is  
24 the position of the OFIA and the OLMA that they rely on  
25 the existing system and on any system subsequently to

1 be approved by the applicable federal and provincial  
2 authorities for the use of the products that they use  
3 in the area of the undertaking.

4 The industry, given its role in the area  
5 of the undertaking, has a vital interest in ensuring  
6 that it uses only safe and properly registered products  
7 in accordance with the applicable and governing  
8 legislation.

9 And it is for that reason, Mr. Chairman,  
10 that the Ontario Forest Industries Association and the  
11 Ontario Lumber Manufacturers Association take no  
12 position on the general jurisdictional issues raised by  
13 the applicant, Forests for Tomorrow, but we have set  
14 out in paragraph 42 of our factum certain factual  
15 matters that, in our submission, may prove of some  
16 assistance to the Board in considering the issues upon  
17 which you have been addressed this morning.

18 And finally, Mr. Chairman, if I could  
19 just anticipate the question there. Mr. Cassidy was  
20 good enough, during the course of the last few moments,  
21 to check on the Harwood case for us, I didn't have that  
22 ready to hand, and I am informed that that was a civil  
23 case, it was an action on a covenant in a mortgage, and  
24 we will have copies of the headnote available for you  
25 right now.

1 THE CHAIRMAN: Thank you.

2 MS. CRONK: I apologize for the quality  
3 of the photocopying.

4 THE CHAIRMAN: Ms. Cronk, just before you  
5 conclude, I do have one question.

6 Going back to part of your earlier  
7 submissions, in the event that another party called  
8 evidence of this nature to deal with the effects on  
9 humans of the use of pesticides, et cetera, to what  
10 extent, in your view, should the evidence called on  
11 those issues be put before the Board in terms of health  
12 studies and things that have already been dealt with  
13 presumably by other regulatory authorities?

14 I understand your client's position, they  
15 are relying on whatever studies or inquiries or  
16 investigations have been undertaken in the registration  
17 process both before the federal and provincial  
18 authorities who normally have that jurisdiction.

19 Should another party, however, wish to  
20 call evidence about the impacts on humans relying on  
21 their interpretation of the Environmental Assessment  
22 Act, Section 5(3), definition of environment, et  
23 cetera, to what extent should the course of those  
24 inquiries take before this Board?

25 Do you have any position on whether or

1 not matters which have been dealt with by the other  
2 regulatory authorities should be repeated before this  
3 Board or can be repeated before this Board?

4 MS. CRONK: I should say two things, Mr.  
5 Chairman, in response to that. The first is: It is  
6 our client's position, as outlined in the factum we  
7 filed, that on the general jurisdictional issues raised  
8 it takes no position whatsoever one way or the other.  
9 And it flows from that, sir, that I am unable to assist  
10 you on the question that you have just put to me.

11 THE CHAIRMAN: Okay. I tried to get in  
12 through the back door, but I was unsuccessful.

13 Very well.

14 MS. CRONK: Thank you, sir.

15 THE CHAIRMAN: Thank you.

16 MS. MURPHY: If we could take 15 minutes  
17 before we proceed?

18 THE CHAIRMAN: Yes, that would be  
19 appropriate. Thank you. We will make it 20 minutes,

20 MS. MURPHY: Thank you.

21 ---Recess taken at 3:45 p.m.

22 ---On resuming at 4:20 p.m.

23 THE CHAIRMAN: Thank you, ladies and  
24 gentlemen. Please be seated.

25 Ms. Murphy, it has been a long day. I



1 think we are going to try and not sit past, say, 5:15.  
2 I understand that you will be longer than that and we  
3 will just pick it up tomorrow morning.

4 MS. MURPHY: Yes, that's fine. I  
5 understand, and it has been a long day. I started out  
6 feeling something like a race horse, but I can't say I  
7 do now, especially after watching how hard my friends  
8 worked. And somewhere around that time when I get to a  
9 good time to break, I will advise.

10 What you are going to need will be my  
11 Statement of Fact and Law, you will also need my book  
12 of authorities, and I am also going to be referring,  
13 though I probably won't get to it today, I will at some  
14 stage be referring to some authorities that are in Mr.  
15 Castrilli's book of authorities.

16 Just before I begin, I would like to draw  
17 your attention, just so that we can focus on what it is  
18 we are talking about, to my statement of the issues  
19 which I have set out on page 12 of my Statement of Fact  
20 and Law. And you will see it is similar to what you  
21 have seen from the other parties, but I have structured  
22 it slightly differently. So I thought I would bring  
23 that your attention.

24 Therefore, what we are suggesting are  
25 that the issues here today really are as follows: Does

1 the Environmental Assessment Board have the  
2 jurisdiction to consider any evidence on the potential  
3 human health effects of the pest control products the  
4 proponent proposes to use within the area of the  
5 undertaking. And in our view the answer to that  
6 question is yes.

7 Second, does the Environmental Assessment  
8 Board have the jurisdiction to compel the proponent to  
9 call a specific witness or any witness to give  
10 testimony on the potential human health effects of the  
11 pest control products and formulations the proponent  
12 proposes to use within the area of the undertaking.  
13 And, as you are aware, our submission on that would be  
14 that the answer should be no, and that's really key to  
15 the relief sought by Mr. Castrilli.

16 The third matter - and I intend to take  
17 some time looking at it because I think this one is  
18 very important and is really central to Mr.  
19 Castrilli's - does the Environmental Assessment Act  
20 impose specific evidentiary requirements which must be  
21 met as a statutory precondition to the consideration of  
22 the acceptance of an environmental assessment and  
23 approval to proceed with an undertaking?

24 And, finally, the last question: Does  
25 the Environmental Assessment Board have jurisdiction to

1       compel the proponent to withdraw from its statement of  
2       evidence of Panel 12 the document that we have been  
3       discussing by Ormrod and Ritter and, in addition,  
4       certain paragraphs from the witness statement. And on  
5       that point, our submission will be that the issues is  
6       moot.

7                       And if I didn't tell you on point three,  
8       our position would be that the answer is no.

9                       Now, in order to understand why we are  
10      here today, we have to look very closely at the Ontario  
11      Environmental Assessment Act, what it requires and how  
12      it works. Our legislation, the Ontario Environmental  
13      Assessment Act, is our own and the structure is unlike  
14      environmental legislation in other jurisdictions.

15                      It has significant strengths when  
16      compared to similar legislation in other jurisdictions,  
17      and I think you have to take cognizance of those. It  
18      also has a few weaknesses and I think that the reasons  
19      we are here today flow both from the strengths and  
20      weaknesses of our legislation.

21                      I would like to say a few words first  
22      about one of the weaknesses that I think has caused us  
23      all difficulty in this hearing and I think it is very  
24      important to put our minds to it. The Ontario  
25      Environmental Assessment Act sets out statutory

1 requirements for the kinds of information required of  
2 proponents. It provides mechanisms for comment from  
3 interested persons, but it does not require those  
4 persons at any time to state their case.

5 This causes a great deal of difficulty  
6 and, in particular, it causes difficulty in a situation  
7 like this where an environmental assessment is referred  
8 to the Environmental Assessment Board for a hearing.  
9 Even in this kind of situation, while there is a very  
10 high onus and an expectation of proponents that they  
11 will provide information and, in fact, take the  
12 position - that's very important, proponents are  
13 expected to take a position - there is no corresponding  
14 onus or expectation of anyone else.

15 This is unlike other kinds of civil  
16 proceedings or many other kinds of board hearings  
17 because in fact, Mr. Chairman, we begin this hearing  
18 and continue this hearing not knowing a couple of very  
19 important things.

20 First of all, Mr. Chairman, even today,  
21 we do not know who all the parties are or who they will  
22 be by the time we are finished. We have had new  
23 parties admitted as the proceedings have gone along, I  
24 expect that will continue, and as we have new parties  
25 we will have new issues.

1                   With respect to the parties who are  
2                   involved, we do not know what their positions are on a  
3                   number of matters and we don't know what their  
4                   responsibilities are.

5                   In this kind of situation, I think you  
6                   have to keep the situation clearly in mind that that's  
7                   what we are doing. It seems very difficult to make the  
8                   argument that a proponent has to meet all of the issues  
9                   at some standard where, at this point in time, we don't  
10                  even know who all the parties are, let alone what the  
11                  issues are in their view.

12                  In this hearing the proponent has no  
13                  meaningful notice of the case it has to meet. Mr.  
14                  Castrilli told you that he was concerned about us being  
15                  in a position of replying to evidence he might call and  
16                  he said it was patently unfair, the words he used  
17                  "manifestly unfair" for them to have to say something  
18                  without knowing what case they had to meet. Mr.  
19                  Chairman, we are the ones who are in that position and  
20                  have been from the beginning.

21                  You made a comment, Mr. Chairman, about  
22                  witness statements and the trading of witness  
23                  statements providing some kind of discovery. We are  
24                  not trading witness statements, we should keep that  
25                  clearly in mind. The proponent at this point in time



1 is providing witness statements but no one else has had  
2 to provide theirs and won't have to provide theirs  
3 until our case is over.

4 In those circumstances, how could it be a  
5 rule or even reasonable to say that the proponent has  
6 to meet all the potential issues in its case when we  
7 don't know what case we have to meet until, in this  
8 particular situation, the end of our case. You have  
9 been trying to deal with this problem yourself by  
10 creating the scoping process, but it is a real problem  
11 and it is one we are all trying to face.

12 I would suggest to you this problem isn't  
13 unique to this environmental assessment hearing and I  
14 would suggest to you that that's the reason that you  
15 see in a number of judgments, the one that's been  
16 referred to here is one of the Hydro cases, but I would  
17 suggest to you that's the reasoning and the rationale  
18 behind the comment that a proponent must and, in fact,  
19 has the right to make judgments about the level of  
20 detail on any matter to be discussed in their  
21 environmental assessment and they have the right to  
22 meet those judgments, at least in first instance.

23 Given the broad definition of the  
24 environment in this legislation, and the virtually  
25 unending permutations and combinations that flow from

1 Section 5, Section 5(3) in particular, there is no  
2 other way to make the legislation work than to say:  
3 Proponent, you take the first cut at it.

4 In fact, I think what the Board has been  
5 saying lately is not only do you have the right to do  
6 that, you have the responsibility to do that and to  
7 tell people what your position is. And that's what we  
8 have attempted to do.

9 THE CHAIRMAN: Okay. Just for the sake  
10 of argument at the moment, assuming that is correct,  
11 the EA is proponent-generated, the proponent takes a  
12 first cut at the EA in defining the issues that they  
13 feel are necessary to fulfill their statutory  
14 obligation under the Act.

15 Now, what is your position when other  
16 parties in reviewing the EA and preparing to meet your  
17 case, as expressed in the EA or other documentation  
18 raise the possibility that, in their view, there are  
19 deficiencies and that those deficiencies should be  
20 addressed?

21 And I would like you to confine your sort  
22 of consideration of my question not solely to the  
23 extent that those parties that raise these deficiencies  
24 might wish to address those topics in their own case,  
25 but deal with it in terms of: Does that create any

1 responsibilities on the proponent to deal with those  
2 issues.

3 MS. MURPHY: When people receive this  
4 documentation and review it, we attempt to make our  
5 best effort to make available to them our position and  
6 our evidence. We are never in written material going  
7 to be able to do a perfect job of that, but we do our  
8 best.

9 Now, people can read that and look to it  
10 and say: Well, I think there is a problem here. They  
11 might say any of a number of things. They might say:  
12 I want more information, they would provide us with an  
13 interrogatory in that situation and we respond, either  
14 by providing the information or by taking a position it  
15 is irrelevant or by saying we just don't know. But  
16 that's one of things they can do, and they have been  
17 doing it.

18 They can raise it at the scoping meeting  
19 and suggest that there is something here that should be  
20 said. It is my view -- and let's just speak about that  
21 for a minute. They come to the scoping meeting or they  
22 come here and they say: We think there is something  
23 more that should be said. It is our responsibility to  
24 listen to that and to make a decision about whether we  
25 should do something about it, but we can't do anything

1       about it unless we have a pretty clear idea - and I  
2       mean a very clear idea - what the problem is, because  
3       it seems to me that the person who is suggesting that  
4       there is something wrong has got to be telling us in  
5       some way that a reasonable proponent or a reasonable  
6       Minister, when you are looking at another kind of  
7       situation, or a reasonable EA Board can figure out  
8       precisely what they want and how to respond.

9                       And I would suggest a general comment  
10       that we want more, more on this kind of effect is not  
11       sufficient to give us that kind of information. In  
12       fact --

13                      THE CHAIRMAN:   Would not that be the  
14       case, Ms. Murphy, where the proponent or any party  
15       calling the evidence in the first instance has taken a  
16       definite position on something and the opposition, for  
17       whatever reason, disagrees with that position? It is  
18       always open to the opposition to call their own  
19       evidence--

20                      MS. MURPHY:    True.

21                      THE CHAIRMAN:   --to cross-examine--

22                      MS. MURPHY:    True, which has not been --

23                      THE CHAIRMAN:   --the proponent on the  
24       evidence that they have called. But if you are into a  
25       situation where the proponent is saying effectively:

1 We are not going to call any evidence of our own to  
2 deal with this specific issue, we instead are going to  
3 rely on other regulatory tribunals' handling of the  
4 issues in terms of the registration process -- when you  
5 say you are having difficulty in knowing precisely what  
6 the opposition wants, they don't have anything in front  
7 of them with which to specifically agree or disagree  
8 with.

9 Their position supposedly is: Some other  
10 body regulated this and whatever information might have  
11 been in front of the other bodies is not before this  
12 tribunal and, therefore, we can't tell you at this  
13 stage whether or not in fact there is something we  
14 disagree with. Is that not similar to the situation we  
15 are into?

16 MS. MURPHY: Well, the difficulty is  
17 this, all right. We don't know today what situation we  
18 are into, and I think what I want to do before I am  
19 finished with my submissions is give you an answer to  
20 the question that has come up a number of times which  
21 is: Why is the evidence structured the way it is, what  
22 generally is it that we are going to talk about, and  
23 what generally is it that we rely on.

24 Because what I spoke to in my factum and  
25 what I'm speaking to today is advising that the



1 Ministry of Natural Resources at this point is relying  
2 on the federal registration and provincial  
3 classification scheme in place for the proposition that  
4 it is reasonable to conclude that the use of registered  
5 products in an approved manner will not result in  
6 significant human health effects. That's the  
7 proposition that we are relying on.

8 Now, that doesn't mean we don't go  
9 further in our evidence with other mechanisms and other  
10 things that happen after making that assumption. What  
11 we are saying is, that is a primary assumption that we  
12 intend to rely on.

13 The difficulty is you haven't heard the  
14 evidence and you haven't heard the cross-examination.  
15 I don't know, for example, if people want to  
16 cross-examine on that regulatory structure, the  
17 question is: Is there someone there to answer their  
18 questions. And I would suggest to you that the answer  
19 is yes.

20 This is one of the difficulties. I don't  
21 know what questions they want to ask, but I can tell  
22 you that if they are asking questions generally about  
23 how that legislation works, that there are some people  
24 that are in these panels that would be able to respond  
25 at a certain level to some of those questions. Until

1 we know what those questions are, we can't go any  
2 further to determine whether the evidentiary burden has  
3 been met.

4 THE CHAIRMAN: And if --

5 MS. MURPHY: As I say, I would like to  
6 sort of later, once I have given you some more of the  
7 structure, I do want to go back because I know it is a  
8 question and it's fair to ask how do we see the whole  
9 structure, what's the theory of our whole case, and I  
10 intend to speak to that because I think that is  
11 important for you to understand in order to consider  
12 this particular question.

13 THE CHAIRMAN: Well, okay. Just before  
14 you go on, then I won't interrupt you further, but is  
15 it your position, or MNR's position that the Board is  
16 entitled to and will be given the opportunity to, in  
17 the structure of your own case, to look at the  
18 sufficiency and/or reasonableness of the federal and  
19 provincial regulatory structure with regards to  
20 pesticides, but will not be given the opportunity to  
21 investigate the material or studies upon which those  
22 other regulatory agencies arrived at their conclusions  
23 which ultimately led to registration?

24 MS. MURPHY: I think, first of all, that  
25 there will be a possibility to explore how the

1       legislation works and certainly, to the extent of  
2       looking at how the Ministry of the Environment's  
3       legislation works, that may well be something that the  
4       Ministry of the Environment may want to answer  
5       questions about.

6                       But, in any event, how MNR deals with  
7       that legislation and so forth is certainly something  
8       that these witnesses can discuss and can answer  
9       questions about. One of the witnesses -- by the way, I  
10      better mention, one of the witnesses in Panel 13 is Mr.  
11      Kingsbury. Mr. Kingsbury has a long experience dealing  
12      in as part of the federal regulatory process. So there  
13      are people to ask questions of that nature too.

14                     THE CHAIRMAN: But can Mr. Kingsbury or  
15      any of the other witness on the panel answer questions  
16      about the basis upon which, say, the federal regulatory  
17      agency arrived at its conclusion?

18                     MS. MURPHY: On a specific product?

19                     THE CHAIRMAN: Yes.

20                     MS. MURPHY: No.

21                     THE CHAIRMAN: Okay.

22                     MS. MURPHY: And this is the problem  
23      because what you have asked me now is the second  
24      question, is: Will the information upon which those  
25      federal agencies made their decisions be available.

1       That information is not available to us. That's true  
2       and that's a problem.

3               To the extent that we have any  
4       information that's available to us and we can provide  
5       it. That information is not -- the information relied  
6       upon by the federal regulatory agency in making its  
7       determinations is not information that is available to  
8       us, so we couldn't get it and give it to you.

9               MR. MARTEL: Will there be someone who  
10       will be able to answer questions with respect to the  
11       possible effects of pesticides or herbicides on people?

12               We have a great deal of information how  
13       it might affect aquatic life or terrestrial life, but  
14       what about the possible effect -- and in fact there is  
15       a good deal of information, having read it, on how we  
16       protect workers when they are in fact preparing to  
17       apply and prepare the sprays and whatnot, but will  
18       there be someone who is going to be able to answer  
19       questions either, the panel themselves here, as to the  
20       possible effects of exposure or overexposure to any of  
21       those toxic substances?

22               MS. MURPHY: I think at this point my  
23       best response to that is there will be people here who  
24       can respond to questions about how it is done, how risk  
25       assessment is done, but there is no one in our power to

1       get our hands on and no information in our power to get  
2       our hands on that shows how that particular assessment  
3       process was used with respect to a particular product.  
4       We don't know.

5                   MR. MARTEL:  I don't think I quite asked  
6       that, though.  I am trying to get at possible effects.  
7       You mention in your own -- in the EA itself, you say  
8       there are possible effects.

9                   MS. MURPHY:  Right.

10                  MR. MARTEL:  And how is it that we are --  
11       either the panel or someone else raising questions,  
12       will there be someone who can -- I mean, everyone knows  
13       there's latency periods when you deal with  
14       carcinogenics.  So I mean, are we going to be able to  
15       ask someone some questions in that line to determine  
16       whether in fact the materials that are being used in  
17       fact are or are not harmful to people?

18                  MS. MURPHY:  All right.  What you are  
19       pointing out, Mr. Martel, is exactly my problem and  
20       that is that with certain of the questions you are  
21       asking my answer is yes, there will be people who will  
22       be able to respond to certain of your questions.  They  
23       will just have to respond to the ones you ask and when  
24       they can't respond they will say so.

25                  But until we know what your questions are



1 and until they get an opportunity to respond, we don't  
2 know what's left out and we won't know what's left out  
3 and what's left out that's significant and whether, in  
4 the circumstances, it is wise to attempt to supplement  
5 that until at least we have gotten to the end of the  
6 cross-examination of these two panels at the very  
7 least.

8 Now, again, you are raising again  
9 something, as I say, I would like to get to a little  
10 later because I think the question that you ask is  
11 really relevant to that matter I said I would like to  
12 discuss generally about the whole structure, because it  
13 does make a difference.

14 The thing that concerns me, though, is  
15 that the thing we are talking about here today, the  
16 item we are talking about here today has a very strong  
17 emotional content, and I am concerned that the  
18 emotional content in this particular matter may inform  
19 somebody's thinking to the extent that they might miss  
20 a basic principle.

21 And, Mr. Jeffery, this has happened in  
22 this hearing to date on a number of occasions, and I  
23 won't cite specific examples, I will give you a general  
24 kind of example. What has been happening is, somebody  
25 is cross-examining a witness and they ask the witness a

1 question and the question -- the witness gives an  
2 answer or an opinion that that person wasn't expecting  
3 or didn't want and the person proceeds to attempt to  
4 get the witness to say something else or to elicit more  
5 information, or the witness says I don't know and the  
6 person attempts to elicit more.

7 And eventually you, Mr. Chairman, have  
8 said from time to time, in effect: Mr. Jones, you have  
9 asked the question, you've had your answer. If you  
10 think this is wrong or that we need more, tell us about  
11 it in your case. And I suggest to you that's the right  
12 answer in those situations and I suggest you should  
13 think about this as being the right answer in this  
14 situation as well.

15 Now, I was explaining to you what I  
16 thought were the weaknesses that caused this problem  
17 and I think it is a significant problem, but there is  
18 something very important about the strengths of this  
19 legislation that shouldn't be missed because what's  
20 happening here today and in this hearing is something  
21 that demonstrates one of the strengths of the  
22 legislative scheme in Ontario that is different from  
23 the other schemes in other places that have been cited  
24 to you; that is, that the Environmental Assessment  
25 Document prepared by the decision-maker in this

1 situation --

2 THE CHAIRMAN: Prepared by the proponent  
3 or the decisionmaker?

4 MS. MURPHY: Well, this is the point.  
5 The Environmental Assessment Document in this situation  
6 is prepared by the proponent for another  
7 decision-maker. It is not like the situation that  
8 obtains in the American case law and in the other  
9 Canadian situations, and this is really an essential  
10 difference. The ultimate decision-maker in an  
11 environmental assessment in Ontario is an independent  
12 third party, the Board or the Minister.

13 THE CHAIRMAN: So is the point you are  
14 making, Ms. Murphy, that in Ontario the Environmental  
15 Assessment Document is proponent-generated for an  
16 independent decision-maker, being a tribunal in this  
17 case; in other jurisdictions it is not necessarily  
18 prepared by the proponent?

19 MS. MURPHY: In other jurisdictions it is  
20 prepared by the decision-maker. That's what happens in  
21 the American system that we are hearing about, the  
22 American federal system, is that the environmental  
23 assessment piece of paper and the person who prepares  
24 that and the person who makes the ultimate decision is  
25 the same person, all right. That's an essential

1 distinction and I would like to speak to it a little  
2 more.

3 But I think what that means -- and what  
4 is very important in Ontario is that the actual  
5 environmental assessment, the entire environmental  
6 assessment, is happening at the hearing, it is  
7 happening here and now especially where it is done at  
8 at a hearing.

9 The environmental assessement, as it  
10 were, is completed in a public forum and all of the  
11 evidence that's led, including the evidence of other  
12 parties, Mr. Chairman - and I am going to be referring  
13 to a case that' actually deals with that - all of the  
14 evidence led by everyone in that large environmental  
15 assessment is considered by the Board and the Board  
16 comes to a decision on the substance of the matter.

17 Therefore, I take exception to Mr.  
18 Castrilli's comment, in fact I find it surprising when  
19 he says that he is here only to rebut the environmental  
20 assessment. It is our view that the structure of this  
21 legislation was put together very much with the idea in  
22 mind that the individuals who are interested in this  
23 environmental assessment would come to this hearing not  
24 only to criticize a document or our case, but that they  
25 are here with an opportunity to contribute to the

1 process and to attempt openly to influence your  
2 decision, the ultimate decision. This process is  
3 entirely open to people to do that. That is not the  
4 situation in the other jurisdictions.

5 So that, Mr. Martel, I was just pointing  
6 out that in the other jurisdictions, in the American  
7 cases that you were hearing about, for example, what  
8 happens is the person who is going to make the ultimate  
9 decision also writes the environmental assessment and  
10 then decides. That's one thing that's very different.

11 And another thing that's very different  
12 is that in the American situation there is nothing  
13 built into the legislation that allows for sort of  
14 penal sanctions that says: If you don't do it, this is  
15 what happens to you. So the way they have to deal with  
16 it in the United States is that when that  
17 decision-maker writes their document and then comes to  
18 a decision and then they hand it out, what happens is  
19 if someone is unhappy with that decision, what they  
20 have to do is go to a court and there the onus is entirely  
21 on them, that is a situation of a real onus. That  
22 person is a plaintiff in a court and they go to that  
23 court and have to convince that court not that the  
24 ultimate decision was wrong, but that the  
25 decision-maker came to it in the wrong way.



1                   And so what happens is, and what the  
2           American courts have done is they have looked at that  
3           list of things that a proponent is -- or a  
4           decision-maker is required to do and they say: You had  
5           better make sure you've done every one of those and, if  
6           you haven't, we will vacate your decision.

7                   But they don't -- and they don't have any  
8           authority to change the decision. The decision-maker  
9           then goes and tries to dot the i's and cross the t's  
10          and then makes a decision again, and it can be exactly  
11          the same decision.

12                   The structure in Ontario is very  
13          different. Not only do you have a third party who is  
14          making the ultimate decision, but it's our view that  
15          what they should be interested is in the substance of  
16          the matters that are before them not the dotting of the  
17          i's and the crossing of the t's, especially where the  
18          other parties are able to come and influence the real  
19          substance of the decision. And I'm just suggesting  
20          that to import some ideas that were developed in a very  
21          different sort of circumstances really undermines the  
22          whole purpose behind this legislation.

23                   If I can ask you to look at page 3 then  
24          of my factum, I'm going to take a few minutes to take a  
25          look at the facts.

1                   And essentially we haven't added much  
2           into the text part of the facts. We have pointed out  
3           that the Ministry of Natural Resources intends to call  
4           evidence on a number of matters and we've pointed out  
5           in No. 3 that the herbicides in use for forest  
6           management all have agricultural and non-crop  
7           registrations as well as the forestry registration.  
8           That information is important when you look at the  
9           federal regulatory process to see what kinds -- what  
10          sort of burden of proof there is on people who are  
11          taking these products forward.

12                   We also point out, and I will be speaking  
13          to this at more length later, but we also point out  
14          that the document that is being discussed, the document  
15          by Ormrod and Ritter was labeled on its face for  
16          information and I think that is something you should  
17          keep in mind, and I would like to discuss the sort of  
18          results of that with you when I get to the end.

19                   If you go over the page, there's a review  
20          of the major sections of the Pest Control Products Act,  
21          the Canadian legislation, and it's pointed out that in  
22          Section 6 -- in paragraph 6 under federal legislation  
23          of pesticides imported into or sold in Canada for  
24          forestry must be registered and, in order to have the  
25          product registered, an application for a certificate of

1 registration must be made. So every product that is  
2 going to be used for these purposes has to have gone  
3 through this process.

4 If you look to the next part you will see  
5 that Section 9(1) of the federal regulations requires  
6 that the applicants provide to the Minister, and what's  
7 important here is information with respect to safety.  
8 This is to point out to you that this is directly an  
9 issue when a person is seeking registration that they  
10 have to provide - and it's pointed out in the  
11 legislation therefore that there is an issue and thatr  
12 this information has to be provided.

13 And as you follow through Section 9(2)  
14 you will see in some detail the kinds of information  
15 with respect to that issue that is required so that the  
16 Minister can make decisions, first of all, about  
17 whether the product should be registered and, if so,  
18 subject to what terms and conditions.

19 And the point I was making earlier, if  
20 you look to the bottom of that page that, where  
21 products are intended to be applied to plants or  
22 animals or products that are for human consumption,  
23 that further information is required with respect to  
24 data about administration to test animals and so forth.

25 You will see under paragraph 9 that the

1 Minister has the right to refuse to register a product  
2 in certain circumstances. The important one for us  
3 today is in Section (d) that:

4 "The Minister may refuse, where the use  
5 of the controlled product will lead to an  
6 unacceptable risk of harm to..."

7 And if you go to the next page:

8 "...public health, plants, animals or the  
9 environment."

10 In the next part, it basically sets out  
11 specific information that is required for restricted  
12 products and the evidence will be that the products  
13 that are used for forest management, for aerial  
14 applications are all restricted products under this  
15 legislation. You will see that has a requirement on  
16 the product itself to talk about whatever significant  
17 hazard there might be to public health and so forth.  
18 So that is right on the product label.

19 And, finally, with respect to the federal  
20 legislation I wanted to draw your attention on my page  
21 8 --

22 MR. MARTEL: Could I ask a question, Ms.  
23 Murphy? On the labelling, isn't that similar to the  
24 WHMIS Agreement that you have to label the content on  
25 the drums or so on before using them?

1 MS. MURPHY: I'm sorry, which agreement?

2 MR. MARTEL: Like the WHMIS Agreement,  
3 the new federal/provincial agreement that came out in  
4 '87 -- spring of '87 which is country-wide?

5 MS. MURPHY: Yes. I'm familiar with  
6 requirements -- new requirements in Ontario.

7 MR. MARTEL: Yes.

8 MS. MURPHY: Occupational Health and  
9 Safety, for example, that requires information. As I  
10 understand it, and I would have to consult, but as I  
11 understand it, the information that is required on  
12 these labels complies with the information that is  
13 required under Occupational Health and Safety. If I'm  
14 wrong, I will advise. I think that is the case.

15 MR. MARTEL: Fine, thank you.

16 MS. MURPHY: So, and finally, the last  
17 part with the federal legislation that I would like to  
18 draw your attention to today, and I think this is  
19 important because this legislation does not deal only  
20 with review and approval of new products, this  
21 legislation deals with the on-going right of the  
22 Minister to review and suspend or cancel registration  
23 of a product.

24 And so I set out Sections 19 and 20 of  
25 the regulations that advise that:



1 "During the period of registration, the  
2 Minister may -- or shall when  
3 requested..."

4 Oh, let me turn it around:

5 "During the period of registration of the  
6 controlled product, the registrant shall,  
7 when requested to do so by the Minister,  
8 satisfy the Minister that the  
9 availability of the controlled product  
10 will not lead to an unacceptable risk of  
11 harm to public health."

12 The onus there being on the person who  
13 wants to keep the registration, and that the Minister  
14 may cancel that registration.

15 Those are the highlights and I think it's  
16 importance to understand that this is the context in  
17 which we are talking.

18 The products that we are talking about  
19 here are registered under this legislation. We will  
20 take a minute to look at the Pesticides Act in Ontario.  
21 Again, the pesticides referred to in that legislation  
22 are the ones that are registered under the federal  
23 legislation.

24 If you go over the page to page 9, I have  
25 set out Section 4 of the Ontario legislation. This is

1 a section that talks about basic prohibitions: you  
2 shall not, you may not, use these products; that is,  
3 discharge them into -- discharge pesticides in certain  
4 circumstances. And it's basically saying: You may not  
5 discharge these products in circumstances that are  
6 likely to cause injury to people and so forth. It's  
7 worth reading and I think you should keep in mind that  
8 that is statutory prohibition for which there are  
9 sanctions.

10 In the next paragraph I have explained  
11 that certain people who are engaged in applying these  
12 products must be licensed. The licences are given by  
13 the Ministry of the Environment. Once applicants meet  
14 the requirements of the Act, they give them courses and  
15 so forth and people have to pass a test, I believe, to  
16 get there licence.

17 The next section I set out is very  
18 important for this matter. This is Section 67(2) and  
19 to try to get away from statutory language which is  
20 difficult to read sometimes, the idea is that for  
21 forest management, they are talking about any  
22 airborne -- any extermination from an airborne machine  
23 with the objective of improving production of Crown  
24 timber as defined in the Crown Timber Act must be done  
25 with a permit.

1                   So this is very important because what  
2 happens is that every time there is a project -- every  
3 project in which the intention is to apply a product --  
4 one of these products from an aircraft, aerial  
5 applications, every single one of those projects must  
6 be subjected to a permit application and review of the  
7 application and the giving of a permit by the Ministry  
8 of the Environment.

9                   And you will hear in the evidence of the  
10 kinds of information that is provided in that  
11 circumstance. So it isn't just these products  
12 generally are approved and classified, each project is  
13 the subject of a licence - of a permit rather, each  
14 project of this nature.

15                  The next section that I set out here  
16 indicates that the Director, that's the person  
17 appointed under that legislation, can cancel a permit  
18 or alter a permit in certain circumstances. And I  
19 think it's important to have a look at some of those  
20 circumstances, but many of them relate to the  
21 possibility that there's any danger to the health or  
22 safety of any person, or whether it is likely to be  
23 harmful or material -- or cause material discomfort to  
24 person. And there are a number of other sections  
25 there.

1                   So those permits can be changed, you can  
2                   have terms and conditions, it can be altered on that  
3                   basis.

4                   And, finally, we just point out that  
5                   there is also a Pesticides Advisory Committee separate  
6                   from the Minister of the Environment that looks at  
7                   these matters and can advise the Minister of the  
8                   Environment on any matter they consider advisable.

9                   So it's important here to bear in mind  
10                  that all of these products that we are talking about  
11                  are also regulated under the Ontario legislation,  
12                  scheduled under the Ontario legislation, and that  
13                  approval is given with the aerial applications for each  
14                  specific project.

15                  I was going to go now to a new topic, I  
16                  was just going to go into the law. So maybe we could  
17                  stop here and start with that tomorrow.

18                  THE CHAIRMAN: All right. I think that  
19                  would be a good idea at this point.

20                  Thank you. I guess we will commence  
21                  tomorrow at 9:00 a.m. and it looks like the morning  
22                  will probably be taken up with the remainder of this  
23                  motion and then we will probably hopefully get to the  
24                  scoping exercise early afternoon tomorrow or at some  
25                  point tomorrow afternoon.

1 Mr. Castrilli?

2 MR. CASTRILLI: Mr. Chairman, I just  
3 wonder if my friend can advise me as to how long she  
4 will be tomorrow morning.

5 MS. MURPHY: I might be another hour, I  
6 might be another two. I am not sure. It might not  
7 take the whole morning, Mr. Castrilli, since he's  
8 already replied to our material anyway.

9 THE CHAIRMAN: I'm not sure you agreed  
10 with that, Mr. Castrilli.

11 MR. CASTRILLI: You're right, Mr.  
12 Chairman.

13 THE CHAIRMAN: However, we'll deal with  
14 that tomorrow.

15 Thank you.

16 ---Whereupon the hearing adjourned at 5:00 p.m., to be  
17 reconvened on Tuesday, May 9th, 1989, commencing at  
18 9:00 a.m.

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